Supreme Court, U.S.
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No.01-____

IN THE

Supreme Court of the United States

NEW YORK ASSOCIATION OF CONVENIENCE STORES, NATIONAL ASSOCIATION OF CONVENIENCE STORES, and M.W.S. ENTERPRISES, INC.,

Petitioners,

v.

ARTHUR J. ROTH, COMMISSIONER OF THE DEPARTMENT OF TAXATION and FINANCE OF THE STATE OF NEW YORK, and THE DEPARTMENT OF TAXATION and FINANCE OF THE STATE OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether laws or policies that single out Native Americans for special treatment must be rationally related to "Congress' unique obligation toward the Indians" to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The petitioners are the New York Association of Convenience Stores, the National Association of Convenience Stores, and M.W.S. Enterprises, Inc. who also were parties to the proceedings below. Sugarcreek Stores, Inc. also was a party to the proceedings below but is not participating in this proceeding because it sold many of its assets and changed the nature of its business, and therefore no longer retains an interest in these proceedings.

The Respondents are Arthur J. Roth, Commissioner of the Department of Taxation and Finance of the State of New York, and the Department of Taxation and Finance of the State of New York. Michael H. Urbach, the then-Commissioner of the Department of Taxation and Finance of the State of New York, and the Department of Taxation and Finance of the State of New York were parties in the proceedings below. Because Mr. Roth replaced Mr. Urbach as Commissioner, he has been substituted as the named Commissioner Respondent herein. *Cf.* Supreme Court Rule 35.3.

RULE 29.6 STATEMENT

Petitioner New York Association of Convenience Stores does not have a parent company nor does any publicly held company own 10% or more of its stock.

Petitioner National Association of Convenience Stores does not have a parent company nor does any publicly held company own 10% or more of its stock.

Petitioner M.W.S. Enterprises, Inc. does not have a parent company nor does any publicly held company own 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners New York Association of Convenience Stores ("NYACS"), National Association of Convenience Stores ("NACS"), and M.W.S. Enterprises, Inc. (collectively "Petitioners") respectfully request that this Court issue a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The decision of the New York Court of Appeals denying leave to appeal was entered on July 2, 2001; is not published; and is reproduced in Appendix A to this Petition ("Pet. App. A") at 1a. The opinion of the New York Appellate Division, Third Department, the last substantive decision in this case, was entered August 3, 2000; is reported at 712 N.Y.S.2d 220; and is reproduced at Pet. App. B at 2a. The opinion of the New York Court of Appeals setting the standard of review and remanding to the New York Supreme Court was entered on July 9, 1998; is reported at 699 N.E. 2d 904; and is reproduced at Pet. App. C at 6a. The opinion of the New York Appellate Division, Third Department initially addressing the standard of review was entered on May 8, 1997; is reported at 658 N.Y.S.2d 468; and is reproduced at Pet. App. D at 16a.

JURISDICTION

The first opinion of the New York Court of Appeals was issued on July 9, 1998, and this case then was remanded to the New York Supreme Court. Following an appeal of the ensuing New York Supreme Court decision, the opinion of the New York Appellate Division, Third Department was issued on August 3, 2000. A timely motion for leave to appeal the August 3 decision was denied by the New York Court of Appeals on July 2, 2001. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of sections 282, 282-a, 282-b, 282-c, 284, 284-a, 284-c, 285, 285-a and 285-b of Article 12-A of New York State Tax Law are set forth at Pet. App. F at

29a. Relevant provisions of sections 470, 471, 471-a, 471-b, 471-c, 471-d, 474 and 481 of Article 20 of the New York State Tax Law are set forth at Pet. App. G at 59a. Relevant provisions of sections 1101, 1102, 1103 and 1116 of Article 28 of the New York State Tax Law are set forth at Pet. App. H at 79a. Relevant provisions of sections 1814, 1846 and 1847 of Article 37 of New York State Tax Law are set forth at Pet. App. I at 92a. Section 1 of the Fourteenth Amendment of the United States Constitution is set forth in full at Pet. App. E at 28a.

STATEMENT OF THE CASE

The New York state court's final decision in this case and the District of Columbia Circuit's decision in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) are squarely in conflict with the Ninth Circuit's decisions in *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997), and *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162, 1163 (9th Cir. 1982), with the Fifth Circuit's decision in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), with the Eighth Circuit's decision in *United States v. Aanerud*, 893 F.2d 956, 961-62 (1990), with the Vermont Supreme Court's decision in *In re A.J.*, 733 A.2d 36, 38 (Vt. 1999), and with the Maine Supreme Court's decision in *In re Marcus S., et al.*, 638 A.2d 1158, 1159 (Me. 1994). The Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), has exacerbated the disagreements among these courts.

The issues presented here are of significant importance to Native Americans, to businesses that compete with Native American businesses, and to States with Native American tribes located within their borders, and are likely to continue to arise. Accordingly, this case presents issues

worthy of review by this Court. For these reasons, Petitioners urge the Court to resolve the conflict by granting this Petition for a Writ of Certiorari.

A. The Issue Presented

Multiple States have imposed sales taxes on the purchase of cigarettes and motor fuels, including purchases made on reservations by non-Native Americans. At issue in this case is the New York Department of Taxation and Finance's decision not to enforce against Native American retailers and suppliers the State's own laws imposing taxes on all purchases of cigarettes and motor fuels that the State has the power to tax – including on-reservation purchases by non-Native Americans.

The New York courts below upheld the Department of Taxation and Finance's decision not to enforce the statutorily mandated sales tax requirements, based on the holding that laws that single out Native Americans for special treatment survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment if they further any identifiable government purpose under an ordinary rational basis test. The District of Columbia Circuit agrees that this is the appropriate test in this context. The cited decisions of the Fifth, Eighth and Ninth Circuits and the Vermont and Maine Supreme Courts are squarely in conflict with the New York and District of Columbia Circuit decisions, as these courts instead have held that such laws survive equal protection scrutiny only if they are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

B. Taxation of Sales on Reservations – An Historical Perspective

Native American retailers historically have resisted the imposition of state taxes on cigarette and motor fuel sales, have aggressively marketed their exemptions from state taxation and, because of these exemptions, thus have been able to sell cigarettes to non-Native American purchasers at very low prices. As in this case, a number of States have found that non-Native American purchasers of cigarettes and motor fuels circumvent the imposition of sales taxes by making their purchases on reservations. The result not only has been lost tax revenue to the State, but also lost revenue by businesses located off the reservations. In the past, New York has estimated annual losses of $102 million in sales tax revenue from on-reservation purchases. Current losses are almost certainly higher than New York's past estimates because, in 1999, the State increased its cigarette tax from 56 cents to $1.11 per pack of twenty cigarettes. Tax Law § 471(1), as amended by 1999 N.Y. Laws ch. 1, Pet. App. G at 62a. In New York, the incidence of non-Native Americans traveling to reservations to purchase cigarettes and motor fuel for which State taxes have not been paid has been called the State's "single largest form of tax evasion." James W. Wetzler, then-Commissioner of the Department of Taxation and Finance, *quoted in*, Dana Milbank, *Native Americans' State Tax Breaks Provoke Disputes*, Wall St. J., July 20, 1992, at B2.

The Court has, on multiple occasions, addressed the question of the limits on the power of States to impose taxes on activities that occur on Indian reservations. *See, e.g.*, *Dept. of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 65 (1994); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) ("*Potawatomi*");

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980) ("*Colville*"); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In *McClanahan*, a member of the Navajo tribe living on the reservation challenged Arizona's income tax as it applied to her. The Court struck down the tax, which applied to income earned from on-reservation activity. *McClanahan*, 411 U.S. at 181. The Court distinguished a State's power to impose an income tax on Native Americans, however, from its power to regulate the activity of non-Native Americans on reservations. *Id.* at 168. The proper inquiry in the latter instance "'has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 172 (quoting *Williams v. Lee*, 358 U.S. 217, 219-220 (1959)).

Since 1973, the Court has further defined the limits on the States' power to tax on-reservation activities. For example, this Court has struck down State attempts to tax personal property located on the reservation, vendor license fees for retailers on the reservation, and cigarette sales taxes applying to "on-reservation sales by Indians to Indians." *Moe*, 425 U.S. at 480-481. The Court has repeatedly upheld, however, the imposition of State taxes on the purchase of cigarettes by non-Indians on reservations. *Milhelm Attea*, 512 U.S. at 78; *Potawatomi*, 498 U.S. at 514; *Colville*, 447 U.S. at 161; *Moe*, 425 U.S. at 483. The Court consistently has concluded that such taxes are imposed on non-Native Americans and impose only a minimal collection burden on Native American retailers. *See, e.g., Potawatomi*, 498 U.S. at 513-14; *Colville*, 447 U.S. at 138; *Moe*, 425 U.S. at 483.

The Court's decisions in this area culminated with its decision upholding the very New York tax statutes and

regulations at issue in this case. *Milhelm Attea*, 512 U.S. at 78. Even though the Court clearly and unanimously upheld the New York regulations implementing the State's cigarette sales tax with respect to on-reservation purchases by non-Native Americans, the State repealed the regulations on April 13, 1998, and now refuses to apply to Native American retailers and their suppliers the statutes requiring the enforcement of cigarette and motor fuel sales taxes through all wholesalers and retailers, including those who provide such products on reservations.

C. The State Law and Regulations at Issue

New York law imposes a sales tax on all cigarettes in the State except when the sale occurs "under such circumstances that this state is without power to impose such tax." N.Y. Tax Law § 471(1) (Consol. 2001), Pet. App. G at 62a-63a. Licensed agents purchase tax stamps and attach them to cigarette packs prior to the first sale in the State. The cost of the tax then becomes part of the full price of the cigarettes at each step in the distribution stream. The tax ultimately falls upon the consumer. *Id.* § 471(2), Pet. App. G at 62a. A willful attempt to "evade or defeat" the tax is a misdemeanor. *Id.* § 1814(a), Pet. App. I at 92a. The tax laws authorize enforcement of the cigarette tax through the imposition of monetary penalties on wholesalers or dealers who violate the laws, or through the seizure of cigarettes and any vehicle used to transport cigarettes on which taxes have not been paid in violation of the law. *Id.* §§ 481, 1846-47, Pet. App. G & I at 72a-78a, 98a-103a.

New York law also imposes excise and sales taxes on motor fuels (including diesel motor fuels). *Id.* §§ 282-a, 282-b, 282-c, 284, 284-a, 284-c, Pet. App. F at 34a-48a. The taxes on motor fuels operate in much the same way as the taxes on cigarettes. The taxes apply at the first non-exempt

sale that occurs in the State,[1] are passed through at each stage of the distribution process and ultimately fall upon the consumer. *Id.* §§ 282-a 4, 285-a 3, Pet. App. F at 38a, 52a.

The New York Department of Taxation and Finance (the "Department") issued regulations implementing New York's cigarette sales tax in 1988, which became effective on January 1, 1989. *See* N.Y. Comp. Codes R. & Regs. ("NYCRR") tit. 20, §§ 335.6 and 335.7, Pet. App. K and L at 108a, 115a.[2] The regulations included specific provisions addressing enforcement of the sales tax regulations against Native American retailers and their suppliers which provided that the Department would allow a quantity of untaxed cigarettes, based upon the probable demand of Indian consumers, to be sold to reservation retailers. NYCRR § 335.7(d)(1), Pet. App. L at 117a. The Native American-specific components of the regulations contemplated collection of the tax at the wholesale level before the cigarettes were transported to the reservation. *Id.* § 335.7 (b)(2), Pet. App. L at 116a. In the alternative, a tribe was permitted to enter into an agreement with the State to regulate the distribution of untaxed cigarettes on its reservation in an amount to be agreed upon between the tribe and the State. *Id.* § 335.7(c)(1), Pet. App. L at 116a. No such agreements were implemented here prior to the repeal of the regulations.

The motor fuels regulations also included Native American-specific provisions which set forth a scheme similar to that used for cigarettes. Under these regulations,

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[1] The exemptions include sales of fuel for purposes such as heating, generating electricity, and farming. *Id.* § 282-a 3(b).

[2] Effective December 19, 1990, 20 NYCRR 335.6 and 335.7 were renumbered 20 NYCRR 336.6 and 336.7 without any substantive change. This brief will cite only to the original numbering.

untaxed motor fuels could be sold to tribal retailers in amounts based on the probable demand of Indian consumers. *Id.* §§ 414.6, 414.7, 435.1, 435.2.

D. The *Milhelm Attea* Decision

In *Milhelm Attea*, this Court reversed a decision of the New York Court of Appeals in which that court had held that New York's cigarette sales tax provisions ran afoul of the federal Indian Trader Statutes, 25 U.S.C. §§ 261 *et seq.* The Court of Appeals attempted to distinguish this Court's prior decisions allowing the imposition of such taxes by reasoning that, because New York's regulations imposed taxes at the point of sale from a wholesaler to an Indian retailer, the regulations imposed too heavy a burden on Indian traders and, therefore, must be pre-empted by the Indian Trader Statutes. *Milhelm Attea*, 425 U.S. at 68-69.

Relying on all of the cases stretching back to *McClanahan*, the *Milhelm Attea* Court held that such regulations must be evaluated with an eye toward "reconcil[ing] the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Milhelm Attea*, at 73 (*quoting McClanahan*, 411 U.S. at 165). This inquiry requires the exercise of State authority to be examined in light of the state, federal and tribal interests at stake. *Id.* at 73. Conducting this inquiry, the *Milhelm Attea* Court concluded "that New York's decision to stanch the illicit flow of tax-free cigarettes early in the distribution stream is a 'reasonably necessary' method of 'preventing fraudulent transactions,' [and] one that 'polices against wholesale evasion of [New York's] own valid taxes without unnecessarily intruding on core tribal interests.'" *Id.* at 75 (*quoting Colville*, 447 U.S. at 160, 162). The *Milhelm Attea* Court made a similar determination with respect to each

challenged aspect of New York's regulatory scheme and, with respect to each, found that the State was entitled to collect taxes in the manner proposed. *Id.* at 75-78.

E. Proceedings Below

Following issuance of the *Milhelm Attea* decision in June 1994, the Department, rather than enforce the State's tax laws, conducted negotiations with Indian tribes seeking agreement on the quantities of untaxed cigarettes that would be made available to reservation retailers. In August 1995, Petitioners filed suit in the Supreme Court of New York seeking an order compelling the Department to enforce the tax laws on the grounds that the failure to enforce such laws only against Native American retailers and their suppliers violated the Equal Protection Clause of the Fourteenth Amendment.

1. *The Petitioners*

Petitioner National Association of Convenience Stores is a not-for-profit trade association representing the interests of 2,300 retail company members with over 77,000 stores that sell cigarettes, motor fuel and other products throughout the United States and internationally. Petitioner New York Association of Convenience Stores is a not-for-profit trade association representing the interests of over 3,000 convenience stores in the State of New York that sell cigarettes and motor fuel taxed by the State, as well as other products. Petitioner M.W.S. Enterprises, Inc. is a New York corporation that owns and operates thirty-four convenience stores in the State of New York that sell cigarettes and motor fuel taxed by the State, as well as other products. Twelve of these convenience stores are located in close proximity to Indian reservations and regularly compete with reservation retailers for business.

2. *The First Post-Milhelm Attea Round of Cases*

In their initial complaint in this case, Petitioners alleged that the Department's failure to enforce the tax laws against Native American retailers and their suppliers violated their right to equal protection under the Fourteenth Amendment because the differential enforcement of the tax laws was based on the suspect classification of race. The Department's differential enforcement has caused, and continues to cause, Petitioners to lose business to Native American retailers. Petitioners and their members lose tens of millions and perhaps hundreds of millions of dollars in sales each year due to the Department's differential enforcement. Following an increase in cigarette taxes from fifty-six cents to one dollar and eleven cents per pack that took effect in March 2000, off-reservation retailers reported drops in sales from thirty to sixty percent.

In response to the Petitioners' equal protection claims and their asserted severe economic injury, the Department contended that temporary suspension of enforcement was necessary "to ensure an opportunity for reservation businesses to survive, and to avoid disruptive and potentially violent demonstrations." *New York Ass'n of Convenience Stores v. Urbach*, 658 N.Y.S.2d 468, 471 (N.Y. App. Div. 1997) ("*NYACS I-A*"), Pet. App. D at 21a. At that point, the Department argued that suspending enforcement was a temporary measure in place while they negotiated a solution with the tribes. The Appellate Division held that these proffered reasons were not substantial enough to justify the Department's race-based policy of differential enforcement under a strict scrutiny equal protection analysis, and thus concluded that the Department's policy of non-enforcement

violated the Equal Protection Clause. *Id.* at 472, Pet. App. D at 22a.

In February 1997, while this case was pending before the New York Appellate Division, the Department announced that it would begin enforcement of the State's tax laws against Native American retailers and their suppliers on April 1, 1997. Interim agreements between the Department and certain tribes were reached prior to the date set for enforcement, but the Department began enforcement against other tribes on April 1. Enforcement included the interception of motor fuel and cigarette shipments bound for the reservations, inspection of those shipments and, in some cases, seizures of illegal shipments. These enforcement measures occurred off of the reservations. Some members of Indian tribes that were to receive these shipments reacted by blockading public highways, burning tires, confronting State Police, and threatening and committing acts of violence.

On May 22, 1997, fourteen days after the New York Appellate Division issued its decision, the Governor announced a cessation of the State's enforcement efforts and directed that the regulations implementing the taxes be repealed. The Department then sought and received review from the New York Court of Appeals. Several weeks after that appeal was argued – on April 13, 1998 – the State repealed the Native American components of the regulations. *See* New York Dept. of Taxation and Finance Order (April 13, 1998), Pet. App. J at 104a.

The Court of Appeals found that the repeal of the regulations indicated that the Department had embarked upon a new long-term policy of forbearance from collecting the taxes from Native American retailers and their suppliers. *New York Ass'n of Convenience Stores v. Urbach*, 699 N.E.2d 904, 909 (1998) ("*NYACS I-B*"), Pet. App. C at 13a.

The Court of Appeals then remanded the case to the Supreme Court for further consideration in light of the new Department policy. *Id.* at 909, Pet. App. C at 13a-14a.

In conjunction with issuing the remand, however, the Court of Appeals addressed the Appellate Division's ruling on the standard of review applicable to equal protection claims in this context, and found that the Department's differential enforcement was based not on race, but instead on concerns regarding tribal sovereignty and the restrictions imposed by the Indian Trader Laws. *Id.* at 908, Pet. App. C at 12a. The Court of Appeals concluded that, because the Department's policy was not based on race, it should be judged under an ordinary rational basis standard of review. *Id.*

3. *The Second Post-Milhelm Attea Round of Cases*

On remand, the New York Supreme Court applied the rational basis standard of review mandated by the Court of Appeals. *New York Ass'n of Convenience Stores v. Urbach*, 694 N.Y.S.2d 885, 888 (N.Y. Sup. Ct. 1999) ("*NYACS II-A*"). The Supreme Court found "implicit" in the Court of Appeals' decison the recognition that a long term policy of nonenforcement can have a rational basis, and thus rejected the argument that the non-enforcement policy exceeded respondents' discretionary powers. *NYACS II-A* at 889.

Petitioners sought review in the Appellate Division, which used the Court of Appeals-directed rational basis test to evaluate Petitioners' equal protection claims. *New York Ass'n of Convenience Stores v. Urbach*, 712 N.Y.S.2d 220, 222 (App. Div. 2000) ("*NYACS II-B*"), Pet. App. B at 4a-5a. Applying this test to the Department's policy, the Appellate

Division found that two reasons provided a sufficient basis for the Department's policy of non-enforcement – the need for cooperation by tribes to enforce the tax laws, which the State had been unable to secure, and the threat of civil unrest if the laws were enforced. *Id.* at 222, Pet. App. B at 5a. The Appellate Division reasoned that cooperation by tribes was required because reservation retailers could not be sued for their failure to collect the taxes and State auditors could not enter reservations to examine the required records without the cooperation of the tribes nor compel attendance at off-reservation audits. *Id.* The Appellate Division did not explain why these measures were needed in light of the fact that the regulations contemplated that the collection of the tax would occur at wholesale prior to transporting the goods to the reservation. *NYACS I-B*, 699 N.E.2d at 906, Pet. App. C at 6a-7a.

Petitioners' motion for leave to appeal to the Court of Appeals was denied on July 2, 2001. Accordingly, the Appellate Division's August 3, 2000 opinion is the last substantive opinion in this case.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS AND INVOLVING THREE STATE COURTS OF FINAL DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW.

There is a clear conflict between the New York Court of Appeals and the District of Columbia Circuit on the one hand, and the Fifth, Eighth and Ninth Circuits and the Maine and Vermont Supreme Courts on the other, regarding the appropriate level of scrutiny that applies when evaluating the constitutionality of laws that treat Native Americans differently from non-Native Americans. Specifically, the Fifth, Eighth and Ninth Circuits and the Maine and Vermont Supreme Courts have held that laws that single out Native Americans for special treatment survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment only if they are rationally related to "Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974).[3] The District of Columbia Circuit and the New York state court both squarely disagree with these courts and instead employ an ordinary "rational basis" analysis to determine whether such laws are constitutionally permissible.

The New York Court of Appeals flatly held that the Department's policy of forbearance in enforcing the State's statutorily mandated sales tax collection requirements against Indians is "sustainable" if it satisfies a "'rational

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[3] The Second Circuit, in *dictum*, has signaled its agreement with this view. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 881 n.8 (2nd Cir. 1996) ("[l]egislation must be tied rationally to Congress' 'trust' obligations with respect to the welfare of Indian nations"), *cert. denied*, 519 U.S. 1041 (1996).

basis' standard." *NYACS I-B*, 699 N.E.2d at 908, Pet. App. C at 12a. In applying that standard, the New York Appellate Division explicitly characterized the "rational basis" test that it employed "as the lowest level of judicial review." *NYACS II-B*, 712 N.Y.S.2d at 222 (citation omitted), Pet. App. B at App. 4a-5a. The court's review of the Department's non-enforcement policy thus was based on the premise that "any reasonably conceivable state of facts that could provide a rational basis" for the Department's policy would insulate it from an equal protection challenge. *Id.*

Likewise, in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998), the District of Columbia Circuit explicitly rejected the application of a more focused, less deferential level of scrutiny in favor of an ordinary rational basis analysis, holding that "ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis." 158 F.3d at 1340. Thus, the court required the Narragansetts to demonstrate that their exclusion from the Indian Gaming Regulatory Act had "no rational relationship to any legitimate purpose," and flatly rejected their contention that the purpose had to be tied to the government's special obligation to Indians. *Id.* at 1340-41. Finding that the State's jurisdiction over gaming laws on its own was an "'appropriate' governmental purpose," the court found no equal protection violation. *Id.* at 1341-42.

In stark contrast, the Fifth, Eighth and Ninth Circuits and the Maine and Vermont Supreme Courts have held that legislation or other governmental action treating Native Americans differently must be evaluated through a lens that focuses specifically on whether the special treatment can be tied to the fulfillment of Congress' unique obligations toward the Indians. This test, which is derived from this

Court's decision in *Mancari*, 417 U.S. at 555,[4] constitutes a brand of scrutiny reserved for evaluating government regulations that affect Native Americans, as it is "rooted in the unique status of Indians as a 'separate people' with their own political institutions." *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997), *cert. denied*, *Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998). As the Ninth Circuit views it, only "those statutes that affect uniquely Indian interests" are constitutionally permissible under the *Mancari* standard. *Id.* at 665 By definition, this level of scrutiny is less deferential than a naked rational basis analysis because it requires a nexus between the treatment at issue and a "uniquely Indian interest," as opposed to the more generalized "legitimate governmental interest" evaluated under traditional rational basis review.[5] *Id.* (noting

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[4] In *Mancari*, the Court upheld a preference for hiring Native Americans in the Bureau of Indian Affairs because it was reasonably and directly designed to further Indian self-government and thus constituted the fulfillment of Congress' unique obligation toward the Indians. 417 U.S. at 555.

[5] Several commentators have specifically distinguished the *Mancari* test from ordinary "rational basis" review. *See, e.g.*, L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 740 (2001) ("Congress can exercise its Commerce Clause authority without concern that racial preferences or race-related delegations of authority will be subject to strict scrutiny, but only so long as . . . the actions themselves are 'reasonably and rationally designed to further Indian self-government.'"); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 273 (1984) (the *Mancari* Court "applied more than minimal rationality scrutiny"). In this way, the level of scrutiny required under *Mancari* may be somewhat akin to the intermediate scrutiny that this Court has used to determine whether gender-based classifications violate the equal protection clause. *See, e.g., Tuan Anh Nguyen v. INS*, 121 S.Ct. 2053, 2059 (2001) ("For a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the

that Indian-specific legislation may be upheld under this standard if it is specifically related to Indian land, tribal status, self-government and/or culture).

The Ninth Circuit consistently has based its equal protection inquiry in this context on whether the law at issue can be tied rationally to the "fulfillment of Congress' unique obligation toward Indians," and has upheld statutes as long as the law or policy at issue advances such interests in an identifiable way. *See Williams*, 115 F.3d at 665 (striking down a federal agency interpretation of the Reindeer Industry Act that would have prohibited nonnative entry into reindeer industry in Alaska in part because it was "unrelated to 'Congress' unique obligation toward the Indians'") (citation omitted); *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162, 1163 (9th Cir. 1982) (upholding subsidies to low income housing in remote Alaskan villages because they are "rationally related to the fulfillment of Congress' unique obligation toward Indians and Alaska Natives") (citation omitted); *United States v. Decker*, 600 F.2d 733 740-41 (9th Cir. 1979) (upholding statutes providing Indians with fishing rights promised by treaty), *cert. denied*, 444 U.S. 855 (1979).

Similarly, the Fifth and Eighth Circuits have held that equal protection challenges to laws that treat Native Americans differently from other groups must be reviewed in light of whether the disparate treatment furthers Congress' unique obligation toward the Indians, and not in terms of whether any legitimate governmental purpose whatsoever underlies such enactments. *See Peyote Way Church of God,*

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achievement of those objectives.") (citations and quotations omitted); *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.")

Inc. v. Thornburgh, 922 F.2d 1210, 1216 (5th Cir. 1991) (upholding exemption because the preference at issue could "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians") (quotation omitted); *United States v. Aanerud*, 893 F.2d 956, 961-62 (1990) (premising conclusion that no equal protection violation had occurred specifically on the fact that the Indian preference at issue was "sufficiently tied to 'the fulfillment of Congress' unique obligation toward the Indians'") (citation omitted), *cert. denied* 498 U.S. 822 (1990).

The Supreme Courts of Vermont and Maine likewise have held that the proper inquiry to determine the constitutionality of laws that treat Native Americans as a distinct class is whether the special treatment is rationally tied to the fulfillment of Congress' unique obligations toward Native Americans. *See In re A.J.*, 733 A.2d 36, 38 (Vt. 1999) ("[T]he appropriate standard in assessing the validity of such classifications is whether they are 'tied rationally to the fulfillment of Congress' unique obligation, toward the Indians.'") (citation omitted); *In re Marcus S., et al.*, 638 A.2d 1158, 1159 (Me. 1994) ("The proper inquiry in a determination of the constitutionality of such laws is whether the special treatment could be rationally tied to the fulfillment of Congress's unique obligation toward Indians.").

The New York courts' and District of Columbia Circuit's use of the less exacting pure "rational basis" standard to adjudicate an equal protection claim involving the treatment of Native Americans thus is squarely in conflict with the more precise standard employed by the Fifth, Eighth and Ninth Circuits and the Supreme Courts of Vermont and Maine. The latter jurisdictions have required that the treatment at issue be tied to a specific, predetermined interest – the fulfillment of Congress' unique obligation to

Native Americans; the former have been satisfied with something much less – "any reasonably conceivable state of facts that could provide a rational basis." *NYACS II-B*, 712 N.Y.S.2d at 222, Pet. App. B at 5a.

The Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), appears to have exacerbated the confusion among the courts regarding the appropriate standard of review to apply to laws that use Native American classifications. Both the District of Columbia Circuit's decision in *Narragansett* and the Ninth Circuit' decision in *Williams* were issued after the *Adarand* opinion was issued in 1995. The District of Columbia Circuit, however, did not attempt to distinguish *Adarand* or to justify its application of the rational basis standard in light of the *Adarand* Court's application of strict scrutiny to *all* race-based classifications, including laws that single out Native Americans.[6] The Ninth Circuit, in contrast, discussed the impact of *Adarand* on *Mancari* at length, and questioned the continued viability of any test evaluating Native American classifications other than strict scrutiny in the wake of *Adarand*. *See Williams*, 115 F.3d at 665 ("The Supreme Court's recent decision in *Adarand* only adds to our constitutional doubts about" the constitutionality of policies that single out Native Americans for special treatment).

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[6] *See Adarand*, 515 U.S. at 244 (Stevens, J., dissenting) (citing *Mancari* and stating that the majority opinion's "concept of 'consistency' [in equal protection jurisprudence] . . . would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history").

II. THE COURT BELOW DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT.

Review of the decision below also is warranted because the final decision of the Appellate Division in this matter (which the New York Court of Appeals declined to review) involved important federal questions, and the court's resolution of those questions conflicts with decisions of this Court in at least two fundamental respects.

First, it conflicts with this Court's precedent by using a lower standard of judicial scrutiny than the one required for cases involving the special treatment of Native Americans. New York law requires the Department to deny delivery of tobacco and motor fuel shipments directed to retailers who are not in compliance with their sales tax payment obligations. *See* 20 NYCRR § 335.7(d)(6) (tobacco), Pet. App. L at 118a; *see also* 20 NYCRR § 414.7 (motor fuel). The Department's now official policy, however, is to refrain from enforcing this requirement if such retailers are Indians located on Indian reservations. *See* New York Dept. of Taxation and Finance Order (April 13, 1998) (repealing regulatory provisions enacted to implement tobacco and fuel tax collection procedures for products provided to Indian retailers and sold to non-Indians), Pet. App. J at 104a; *NYACS II-B*, 712 N.Y.S.2d at 221-22, Pet. App. B at 3a. The New York Appellate Division concluded that this non-enforcement policy does not violate the equal protection rights of non-Native American retailers because the Department allegedly has a rational basis for it – the prevention *off of the Indian reservations* of "civil unrest, personal injuries and significant interference with public transportation on the State highways" that Indians in New York perpetrated during the brief time when the

interception/seizure laws were enforced against them. *NYACS II-B*, 712 N.Y.S.2d at 222, Pet. App. B at 5a.

This holding squarely conflicts with this Court's primary holding in *Morton v. Mancari*, that laws and policies that "single[] out Indians for particular and special treatment" may be upheld only if "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians[.]" 417 U.S. at 554-55. In *Mancari*, the Court found that the challenged employment practices that granted a hiring preference to Native Americans in the Bureau of Indian Affairs did not offend the Constitution because the practices were "reasonably and rationally designed to further Indian self-government[.]" *Id.* at 555. The Court recently reaffirmed the continued centrality of the rule that laws and policies singling out Indians for special treatment are constitutionally permissible only if they are reasonably and rationally designed to further Congress' "treaty obligations [or] its responsibilities to the Indian tribes" in some identifiable manner. *Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000) (discussing the import of *Mancari*, 417 U.S. at 555).

The Appellate Division's reliance on a rational basis test under which the Department's non-enforcement policy would "'be upheld against equal protection challenges if there is any reasonably conceivable state of facts that could provide a rational basis,'" *NYACS II-B*, 712 N.Y.S.2d at 222, Pet. App. E at 5a (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993)), thus conflicts with this Court's clear directives in *Mancari* and *Cayetano* that policies and laws that single out Indians for special treatment will be

upheld only if they are rationally related to "Congress' unique obligation toward the Indians."[7]

Second, the New York Appellate Division opinion also conflicts with this Court's prior decisions sanctioning the tax collection methods at issue in this case. The New York court held that the Department had a rational basis for refusing to enforce the statutory sales tax collection requirements against Indian retailers directly on the grounds that, "[b]ecause of tribal immunity, the retailers cannot be sued for their failure to collect the taxes in question, and State auditors cannot go on the reservations to examine the retailers' records." *NYACS II-B*, 712 N.Y.S.2d at 222, Pet. App. B at 5a.[8] In *Potawatomi*, however, the Court indicated that, although States are precluded by sovereign immunity principles from bringing actions directly against a tribe, court actions for damages may be brought against "individual agents or officers of a tribe." 498 U.S. at 514; *see also Moe*,

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[7] In issuing its ruling, the Appellate Division also ignored the *Potawatomi* decision in which the Court made clear that "States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes . . . or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." 498 U.S. at 514 (citations omitted). Moreover, as the Appellate Division recognized during its first review of this case following the issuance of this Court's decision in *Milhelm Attea*, 512 U.S. 61, unequal enforcement of laws to "protect citizens from civil disorder" violates the Equal Protection Clause, "save in those rare instances where civil disorder 'threaten[s] the very existence of the State.'" *NYACS I-A*, 658 N.Y.S.2d at 472 (quoting *Stotland v. Pennsylvania*, 398 U.S. 916, 920 (1970) (Douglas, J., dissenting)), Pet. App. D at 21a.

[8] For the reasons discussed above, this determination conflicts with prior decisions of this Court because it is based on the application of a "rational basis" standard of review that the Court has determined does not apply in this context. *See* Text at 21-23, *supra* (discussing *Mancari*, 417 U.S. 535, and *Cayetano*, 528 U.S. 495).

425 U.S. at 482-83 (sanctioning the use of collection methods such as those encompassed by the Department's now-repealed enforcement regulations). The decision below also ignores the New York statutory mandate requiring a tax to be paid "on all cigarettes possessed in the state by any person for sale," N.Y. Tax Law § 471(1), which this Court specifically determined did not constitute a violation of any Congressional policies with respect to Indians, *see Milhelm Attea*, 512 U.S. at 64,[9] and fails to consider any alternative enforcement mechanisms that may address the issues identified by the Department without implicating equal protection concerns.

III. RESOLUTION OF THESE SQUARE CONFLICTS IS ESSENTIAL.

The Court has made clear that no Congressional enactment or policy "goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in the State." *Colville*, 447 U.S. at 155. If the conflict among the courts and between the New York Court of Appeals and the decisions of this Court regarding the appropriate standard to apply to equal protection challenges involving Native Americans remains unresolved, however, there essentially will be no basis on which to challenge a state law or policy that singles out Native Americans for special treatment in jurisdictions in which the lower "rational basis" standard is applied. Non-Indian retailers in such jurisdictions thus will have no

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[9] The statute makes clear that the tax may not be applied where the State is without power to impose it – such as to on-reservation retail sales made to Indians. N.Y. Tax Law § 471(1). The *Milhelm Attea* Court specifically recognized this exemption in the course of upholding the application of the New York tax provisions to on-reservation cigarette sales made to non-tribe members. 512 U.S. at 64.

effective recourse against a State's failure to enforce statutorily mandated non-discriminatory sales tax burdens on Indian retailers and their wholesaler suppliers.[10]

This Court has recognized that what Indian retailers are able to offer "customers, and what is not available elsewhere, is solely an exemption from state taxation." *Id.*[11] Any such exemption puts non-Indian retailers in these markets at an enormous competitive disadvantage and deprives the citizens of States in which those markets are located of a significant source of government revenue. Indeed, the record in this case demonstrates that non-Indian retailers in the State of New York could be losing hundreds of millions of dollars in business to Indian retailers annually, and that the State of New York is losing more than $100 million in statutorily mandated sales tax revenue per year. Moreover, "[i]t is painfully apparent that the value marketed by [such Indian retailers] to persons coming from outside [the reservation] is not generated on the reservations by activities in which the Tribes have a significant interest." *Colville*, 447 U.S. at 155. There thus appears to be no basis on which a State's failure to impose taxes on such sales as it does on other sales within the State could be upheld under the more restrictive *Mancari* standard relied upon by the

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[10] Similarly, Native Americans will have no effective recourse for challenging laws and government policies which single them out for less-preferential treatment but that are not related to any unique Indian interest.

[11] In *Moe*, the Court recognized that where, as here, the legal incidence for the payment of a sales tax falls on the purchaser but collection efforts for such sales taxes must be asserted against product suppliers and retailers, "the Indian seller doing business on tribal land enjoys [a competitive advantage] over all other cigarette retailers" if the State's ability to assert such collection efforts "is dependent on the extent to which the non-Indian purchaser is willing to flout *his* obligation to pay the tax." *Moe*, 425 U.S. at 482 (emphasis in original).

Fifth, Eighth and Ninth Circuits and by the Supreme Courts of Maine and Vermont.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully urge this Court to grant this Petition for a Writ of Certiorari.

Respectfully Submitted,

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October 1, 2001

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APPENDIX A

COURT OF APPEALS OF NEW YORK

Mo. No. 91

IN THE MATTER OF NEW YORK ASSOCIATION OF CONVENIENCE STORES, *et al.*,

Appellants,

v.

MICHAEL H. URBACH, as Commissioner of the Department of Taxation and Finance of the State of New York, *et al.*,

Respondents.

July 2, 2001.

Motion for leave to appeal denied.

Judge Graffeo took no part.

APPENDIX B

SUPREME COURT, APPELLATE DIVISION,
THIRD DEPARTMENT, NEW YORK

Aug. 3, 2000

In the Matter of NEW YORK ASSOCIATION OF CONVENIENCE STORES *et al.*,
Appellants,

v.

MICHAEL H. URBACH, as Commissioner of the Department of Taxation and Finance of the State of New York, *et al.*,
Respondents.

Before: CREW III, J.P., PETERS, MUGGLIN, ROSE and LAHTINEN, JJ.

CREW III, J.P.

Appeal from a judgment of the Supreme Court (Lang Jr., J.), entered August 2, 1999 in Albany County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to compel respondents to enforce sales and excise taxes pertaining to on-reservation sales of tobacco products and motor fuel by Indian retailers to non-Indian customers.

This litigation arises out of the sale of tobacco and fuel products by Indian retailers to non-Indians on Indian reservations. Tax Law articles 12-A, 20 and 28 impose sales and excise taxes on tobacco and motor fuel sold within this State. While Federal law forbids collection of these taxes on goods sold on Indian reservations to enrolled tribal members (*see, Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 96 S.Ct.

1634, 48 L.Ed.2d 96), such taxes are collectible when sales thereof are made to non-Indian customers (*see, Washington v. Confederated Tribes,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10).

In 1988, respondent Department of Taxation and Finance adopted regulations requiring reservation retailers to pay such sales and excise taxes. The regulations allowed Indian retailers to purchase a limited amount of untaxed tobacco and motor fuel based upon estimates of the demand for otherwise taxable goods by reservation members. All remaining allotments of tobacco and motor fuel were subject to State taxes.

Following adoption of the regulations, a proceeding was commenced by Indian merchants seeking to permanently enjoin the Department from enforcing them and, as a result, the Department then suspended implementation pending the outcome of that litigation. Ultimately, the U.S. Supreme Court held that the regulations were not preempted by Federal law (*see, Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 114 S.Ct. 2028, 129 L.Ed.2d 52). In spite of the outcome of that litigation, the Department continued its nonenforcement policy, as the result of which petitioners, trade organizations representing convenience stores and corporations owning and operating retail stores in New York that sell tobacco and motor fuel, initiated this CPLR article 78 proceeding seeking to compel respondents to determine, assess and collect the taxes relating to the sales of those products when made to non- Indian consumers.

Following commencement of this proceeding, respondents unsuccessfully moved to dismiss the petition on the ground that petitioners lacked standing. Thereafter, Supreme Court granted the petition. On appeal, we found that petitioners had standing, but held that the favorable treatment afforded Indian retailers by the nonenforcement policy constituted a "suspect classification" based upon race. Because respondents sustained their heavy burden of demonstrating that such

racially based policy was constitutional, we affirmed Supreme Court's finding in that regard (230 A.D.2d 338, 658 N.Y.S.2d 468).

The Court of Appeals agreed with this court that petitioners had standing based upon an equal protection claim. The court disagreed, however, with this court's conclusion that the Department's failure to enforce the tax laws constituted race-based discrimination subject to the heightened "strict scrutiny" analysis (92 N.Y.2d 204, 212, 677 N.Y.S.2d 280, 699 N.E.2d 904), concluding that Indian tribes possess attributes of sovereignty and that preferences may therefore be granted to them, not as a discreet racial group but as members of quasi-sovereign tribal entities. Accordingly, the Court of Appeals held that whether the Department's policy of forbearance is sustainable must be determined utilizing the much less demanding "rational basis" standard (*id.*, at 213, 677 N.Y.S.2d 280, 699 N.E.2d 904). The court further took judicial notice of the fact that following the parties' submissions and oral argument, the Department repealed the regulations in question and observed that "what was once portrayed as a temporary policy of abstention in enforcement has now become permanent" (*id.*, at 214, 677 N.Y.S.2d 280, 699 N.E.2d 904). Accordingly, the Court of Appeals remitted the matter to Supreme Court to "reconsider the dispute in light of the Tax Department's newly mintedlong-term policy" and to determine whether such policy is sustainable under a rational basis analysis (*id.*, at 215, 677 N.Y.S.2d 280, 699 N.E.2d 904 [emphasis in original]). Following additional submissions and argument, Supreme Court determined that respondents' policy was rationally based, and this appeal by petitioners ensued.

Our review of the record persuades us that there is indeed a rational basis for respondents' indefinite forbearance. Initially, we note that the "rational basis" test has been characterized as "the lowest level of judicial review" (*Port*

Jefferson Health Care Facility v. Wing, 94 N.Y.2d 284, 289, 704 N.Y.S.2d 897, 726 N.E.2d 449, *cert. denied* — U.S. —, 120 S.Ct. 2744, 147 L.Ed.2d 1008), requiring only that the State's policy "be upheld against equal protection challenges if there is any reasonably conceivable state of facts that could provide a rational basis" (*Federal Communications Commn. v. Beach Communications*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211). The record here clearly reflects such a state of facts, as it makes plain that the statutes cannot effectively be enforced without the cooperation of the Indian tribes. Because of tribal immunity, the retailers cannot be sued for their failure to collect the taxes in question, and State auditors cannot go on the reservations to examine the retailers' records.

Additionally, the Department cannot compel the retailers to attend audits off the reservations or compel production of their books and records for the purpose of assessing taxes. In that regard, representatives of the Department engaged in extensive negotiations with the tribes in an effort to arrive at an acceptable agreement. Those efforts were largely unsuccessful and the vast majority of the Indian retailers refused to register with the Department. In further efforts to enforce the statute, the State attempted interdiction, i.e., interception of tobacco and motor fuel shipments and seizure of those shipments that were found to be in noncompliance with the Tax Law. That strategy resulted in civil unrest, personal injuries and significant interference with public transportation on the State highways. In our view, all of these factors provide a rational basis for the differential treatment of the parties and we, therefore, affirm the judgment of Supreme Court.

ORDERED that the judgment is affirmed, without costs.

PETERS, MUGGLIN, ROSE and LAHTINEN, JJ., concur.

APPENDIX C

COURT OF APPEALS OF NEW YORK.

In the Matter of NEW YORK ASSOCIATION of CONVENIENCE STORES, *et al.*,
Respondents-Appellants,

v.

MICHAEL H. URBACH, as Commissioner of the DEPARTMENT of TAXATION and FINANCE of the STATE of NEW YORK, *et al.*,
Appellants-Respondents.

July 9, 1998.

OPINION OF THE COURT

TITONE, Judge.

The present appeal represents yet another chapter in the long-standing dispute over the enforcement of New York's cigarette and motor fuel taxes as applied to sales made on Indian reservations located within the State. Having spent over a decade litigating its right to collect such taxes, the State Department of Taxation and Finance has recently changed course and adopted a policy of forbearance. This proceeding, brought by competitors of the Indian reservation retailers who have benefitted from that policy, seeks a judicial directive compelling the State to resume tax enforcement with respect to that group.

Articles 12-A, 20 and 28 of the Tax Law impose sales and excise taxes on cigarettes and motor fuel sold within the State. In general, these taxes are collected through a system of prepayments and are then passed along the distribution chain

to the ultimate consumers. Preemptive Federal law forbids collection of these taxes on goods sold on Indian reservations to enrolled tribal members (*Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 483, 96 S.Ct. 1634, 48 L.Ed.2d 96). However, when the goods are sold on the reservation to non-Indian consumers, the taxes may be collected (*see, Washington v. Confederated Tribes*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10; *Moe v. Salish & Kootenai Tribes, supra*).

In 1988, the State Department of Taxation and Finance promulgated a series of administrative regulations to facilitate collection of sales and excise taxes on reservation sales. Under these regulations, Indian tribes, traders and on-reservation retailers were to be allotted a specific quantity of cigarettes and motor fuel for which the taxes had not been prepaid. The allotted amounts were to be based on estimates of the demand for otherwise taxable goods by reservation members (*see*, 20 NYCRR 336.6, 336.7 [cigarette excise tax], 414.6, 414.7 [motor fuel excise tax], 435.1, 435.2 [diesel motor fuel excise tax], 561.17 [prepaid sales tax on motor fuel], 562.2 [prepaid sales tax on diesel motor fuel], 564.2 [prepaid sales tax on cigarettes]). The State's efforts to implement these regulations were suspended, however, pending the disposition of litigation challenging their validity.[1]

That litigation was finally resolved in 1994, when the United States Supreme Court held that the State's regulations were not preempted by the Federal Indian Trader Statutes (*Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 114 S.Ct. 2028, 129 L.Ed.2d 52; *see*, 25 U.S.C. § 261 *et seq.*). Having concluded that "Indian traders are not wholly immune from state regulation that is

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[1] A similar set of regulations was challenged in *Herzog Bros. Trucking v. State Tax Commn.*, 69 N.Y.2d 536, 516 N.Y.S.2d 179, 508 N.E.2d 914, *vacated and remanded* 487 U.S. 1212, 108 S.Ct. 2861, 101 L.Ed.2d 898, *on remand* 72 N.Y.2d 720, 536 N.Y.S.2d 416, 533 N.E.2d 255.

reasonably necessary to the assessment or collection of lawful state taxes," the Court reasoned that New York's system of collecting taxes "early in the distribution stream" and imposing a quota on untaxed goods available for sale to reservation members was an acceptable method of preventing tax evasion (*id.*, at 75, 114 S.Ct. 2028). The Court stressed, however, that its analysis was limited to the particular challenge before it, which was "essentially a facial one," and that its ruling did not address "each feature of New York's tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs," nor did it address the possibility that the State allocations of untaxed goods were not "sufficiently generous to satisfy legitimate [reservation member] demands" (*id.*, at 69, 114 S.Ct. 2028).

What occurred after the United States Supreme Court's decision was handed down is described in affidavits submitted by several State officials responsible for intergovernmental policies relating to Indian nations and tribes. According to these affidavits, an Implementation Task Force that had been created in response to the decision issued Tax Department Notice N-94- 16 (Sept. 1994), which stated that enforcement of the regulations approved in *Milhelm Attea & Bros.* (*supra*) would be delayed until the next salestax quarter. The reasons given for this delay included the need to finalize the plan's technical details, the need to assess the regulations against the "several potential legal obstacles to enforcement" that had been highlighted by the Supreme Court's opinion and, finally, the pendency of "serious discussions with several Indian Nations regarding our respective sovereign concerns."

The following quarter passed without implementation of the regulations. In August of 1995, several nonreservation convenience stores and their representative associations commenced the present proceeding. The petition sought an order directing the Tax Department "to immediately

determine, assess, collect and enforce all New York State cigarette excise and sales taxes and New York State motor fuel excise and sales taxes applicable to on-reservation Indian retailers * * * and otherwise uniformly enforce New York State cigarette and motor fuel tax laws and regulations." Petitioners alleged that both their own competitive interests and the interests of all New York State taxpayers were being impaired by the Tax Department's differential enforcement of those taxes.

Respondents promptly moved to dismiss the petition on the ground that petitioners lacked standing to assert their grievance. Supreme Court rejected respondents' arguments, however, holding that petitioners' standing could be upheld under the analysis utilized by this Court in *Matter of Dudley v. Kerwick*, 52 N.Y.2d 542, 439 N.Y.S.2d 305, 421 N.E.2d 797; *see, Matter of New York Assn. of Convenience Stores v. Urbach*, 169 Misc.2d 906, 646 N.Y.S.2d 918.

Respondents' next motion was one for dismissal on the ground that the controversy was not justiciable. Supreme Court treated this request for relief as a motion for summary judgment (*see*, CPLR 3211[c]) and, reaching the merits, held that the Tax Department's "failure to enforce the Tax Laws against some to whom they apply * * * is unconstitutional" and inconsistent with " 'a government of laws.' " The court directed equal implementation and enforcement of the tax laws "respecting sales of tobacco products and motor fuel by Indians to non-Indian retail consumers on Indian reservations," granted the State a 120-day stay of that order and, finally, directed that collection of all cigarette and motor fuel sales and excise taxes be suspended if implementation did not occur by the end of the stay period.

On appeal, a three-Justice majority at the Appellate Division agreed that petitioners had standing. However, the Court based its decision on the alternative theory that the favorable treatment afforded to businesses involved in on-

reservation motor fuel and cigarette sales represented a "denial of equal treatment" and that this denial "establishe[s] petitioners' standing" (230 A.D.2d 338, 343, 658 N.Y.S.2d 468). Finding that the Tax Department's differential enforcement policy was based upon the suspect classification of race, the Court went on to hold that none of the rationales for the policy that respondents had proffered was sufficient to satisfy the government's heavy burden of showing that the policy was " ' "both constitutionally permissible and substantial, and that its use * * * is 'necessary * * * to the accomplishment' of its purpose or the safeguarding of its interest" ' " (*id.*, at 342, 658 N.Y.S.2d 468, quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 98 S.Ct. 2733, 57 L.Ed.2d 750). Accordingly, like Supreme Court, the Appellate Division majority held that the Tax Department's nonenforcement policy was impermissible.[2] Respondents appealed as of right pursuant to CPLR 5601(a) and (b)(1). We now conclude that the Appellate Division erred in applying the high degree of scrutiny reserved for governmental classifications based on race and other suspect classifications and that its order must be reversed.

With respect to the threshold question of petitioners' standing, we agree with the Appellate Division's conclusion that their grievance was essentially an equal protection claim based on differential enforcement of the tax laws and that, as members of the disadvantaged class, petitioners have a right

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[2] Although it agreed with Supreme Court on the merits, the Appellate Division concluded that that court had gone too far in conditionally directing a State-wide suspension of tax collection if the Tax Department did not correct its unequal implementation of the taxes at the end of the 120-day stay period. The Appellate Division stated that "it was error * * * to have awarded such sweeping, undemanded relief without adequate notice" (230 A.D.2d, at 344, 658 N.Y.S.2d 468). Petitioners have cross-appealed, by permission of this Court, from the resulting modification. In view of our disposition of respondents' appeal, the cross appeal is academic.

to seek judicial resolution of that claim (*see, Regents of Univ. of Cal. v. Bakke, supra*, at 280-282, n. 14, 98 S.Ct. 2733 [opn per Powell, J.], *cited with approval in Northeastern Fla. Ch. of Associated Gen. Contrs. v. City of Jacksonville*, 508 U.S. 656, 665, 113 S.Ct. 2297, 124 L.Ed.2d 586). We find no merit in respondents' contention that this standing theory is foreclosed because petitioners did not couch their grievance in equal protection terms. The petition itself reflected petitioners' intention to assert an equal protection argument by seeking an order compelling respondents to "uniformly enforce New York State cigarette and motor fuel tax laws and regulations." Moreover, as indicated in the affidavits submitted on respondents' behalf, the question of whether the laws were "being equally applied to or enforced against different people, groups or entities" was raised during the oral argument on respondents' motion. It was thus abundantly clear to the parties and Supreme Court that discriminatory enforcement and petitioners' right to equal protection were at the heart of their claim.

Turning to the merits, however, we reject the Appellate Division's conclusion that the Tax Department's failure to enforce the tax laws against a particular class of transactions, i.e., on-reservation sales to non-Indians, constitutes a form of race-based discrimination subject to the demanding "strict scrutiny" analysis. In *Washington v. Yakima Indian Nation*, 439 U.S. 463, 500-501, 99 S.Ct. 740, 58 L.Ed.2d 740, the United States Supreme Court reiterated that " 'the unique legal status of Indian tribes * * * ' permits the Federal Government to enact legislation singling out tribal Indians" even where that legislation "might otherwise be constitutionally offensive" (*accord, Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 479-480, 96 S.Ct. 1634, 48 L.Ed.2d 96, *supra*). The principle is derived from earlier decisions in which the Court recognized that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory * * * they are 'a separate

people' possessing 'the power of regulating their internal and social relations' " (*United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706). Thus, Federal preferences may be granted to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities" (*Morton v. Mancari,* 417 U.S. 535, 554, 94 S.Ct. 2474, 41 L.Ed.2d 290). And, while "States do not enjoy th[e] same unique relationship," they may adopt laws and policies to reflect or effectuate Federal laws designed "to readjust the allocation of jurisdiction over Indians" without opening themselves to the charge that they have engaged in race-based discrimination (*Washington v. Yakima Indian Nation, supra,* at 501, 99 S.Ct. 740). The Tax Department's specialized treatment of on-reservation cigarette and motor fuel sales is clearly such a policy, since it is predicated on the Department's sensitivity to both tribal sovereignty issues and the complex restrictions imposed by the Indian Trader Laws.

Inasmuch as we conclude that no invidious racial discrimination is involved, we must turn to the question whether the Tax Department's policy of forbearance is sustainable here on a "rational basis" standard (*see, Washington v. Yakima Indian Nation,* 439 U.S. 463, 501-502, 99 S.Ct. 740, 58 L.Ed.2d 740, *supra*). The resolution of this question is complicated by recent postargument developments that significantly change the posture in which the present claims by petitioners are presented.

When the case was initially argued before this Court, respondents took the position that the Tax Department's policy of restraint was, in essence, a temporary measure adopted during a period of delicate negotiations in order to avoid actions that could be construed as "a direct affront" to the sovereign status of Indian nations and tribes. As the responsible State officials perceived the situation, these negotiations would be jeopardized if the State were to contemporaneously attempt to enforce its tax laws on the

tribes' reservations. Additionally, the Tax Department had elected to proceed slowly, even in the face of the *Milhelm Attea* decision, because of its concern about the remaining "potential legal obstacles to enforcement" that were suggested in the Supreme Court's opinion. These considerations, respondents contended, provided a "rational basis" for a limited, relatively short-term decision by the Tax Department not to actively enforce the laws imposing motorfuel and cigarette taxes on Indian reservations.

Several weeks after the appeal was argued, however, it was brought to our attention that, on April 28, 1998, the Tax Department repealed the regulations that were challenged in *Milhelm Attea* (*see,* 20 NYS Register, Apr. 29, 1998, Issue 17, Book 1, at 22-24). Since these rules provided the only regulatory framework for enforcing the motor fuel and cigarette taxes on Indian reservations, their repeal signified that the Tax Department has committed itself to withholding active enforcement on a long-term basis. As the Department stated in its notice of adoption, "[t]he decision to repeal the regulations was based on both the inability of the regulations to achieve the purposes of the Tax Law and also the State's respect for the Indian Nations' sovereignty" (*id.*, at 23). Thus, although "the repeal * * * does not eliminate the statutory liability for taxes as they relate to sales on Indian reservations to nonexempt individuals" (*id.*), it does indicate that what was once portrayed as a temporary policy of abstention in enforcement has now become permanent.[3]

Initially, we note our agreement with the parties that this new development, of which we must take judicial notice (*see,*

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[3] The repeal message also makes reference to a proposed legislative package that would provide a tax credit to businesses located near reservations in order to offset the competitive advantage enjoyed by reservation retailers because of the Department's nonenforcement policy (notice of adoption, *op. cit.*, at 24). At this writing, the fate of that proposal is not known.

CPLR 4511[a]), does not render this proceeding moot. Petitioners' pleading placed in issue "[r]espondents' system-wide failure to perform their *statutory* * * * dut [y] * * * * to enforce Article[s] 20 and * * * 12-A of the New York Tax Law" (emphasis supplied), as well as their failure to enforce the implementing regulations. The former aspect of the controversy survives the repeal of the regulations and, indeed, takes on additional urgency in light of the tax agency's determination to abandon altogether its former enforcement mechanisms.

Having concluded that the repealer did not moot the controversy, we nonetheless recognize that the recent administrative action so alters the landscape in which the controversy is presented that it would be unwise and unsound for us to resolve it on the basis of the arguments before us (*cf., Matter of Michael B.*, 80 N.Y.2d 299, 318, 590 N.Y.S.2d 60, 604 N.E.2d 122). Our determinations that petitioners have standing to assert an equal protection claim but that their claim does not implicate racial discrimination leaves for resolution the question of whether the Tax Department's nonenforcement policy is sustainable under a rational basis analysis. Since the Department's former position—that its policy was a justifiable stopgap measure—is not viable in view of the unqualified repeal of the former enforcement regulations, the terms under which the case was argued in our Court and in the courts below are no longer meaningful or useful. Thus, we deem it appropriate to remit to Supreme Court so that the parties can consider the need, if any, for further submissions and the court can reconsider the dispute in light of the Tax Department's newly minted *long-term* policy of abstaining from taking active measures to enforce the legislatively mandated excise and sales taxes on motor fuel and cigarettes destined for sale on Indian reservations.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the matter remitted to Supreme Court for further proceedings in accordance with this opinion.

KAYE, C.J., and BELLACOSA, SMITH, LEVINE and CIPARICK, JJ., concur.

WESLEY, J., taking no part.

Order reversed, etc.

APPENDIX D

SUPREME COURT, APPELLATE DIVISION,
THIRD DEPARTMENT, NEW YORK.

May 8, 1997.

In the Matter of NEW YORK ASSOCIATION
of CONVENIENCE STORES *et al.*,
Respondents,

v.

MICHAEL H. URBACH, as COMMISSIONER of the DEPARTMENT
of TAXATION and FINANCE of the STATE of NEW YORK, *et al.*,
Appellants.

Before CARDONA, P.J., and CREW, WHITE, CASEY and CARPINELLO, JJ.

CARDONA, Presiding Justice.

Appeals from three judgments of the Supreme Court (Harris, J.), entered August 14, 1996, August 14, 1996 and August 28, 1996 in Albany County, which, *inter alia,* conditionally granted petitioners application, in a proceeding pursuant to CPLR article 78, to compel respondents to enforce cigarette and motor fuel taxes pertaining to on-reservation sales of cigarettes and motor fuel to non-Indian consumers.

New York imposes sales and excise taxes upon cigarettes and motor fuel (*see,* Tax Law arts. 12-a, 20, 28), but cannot impose such taxes on sales of those products to enrolled tribal members on Indian reservations (*see, Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96). On-reservation sales to

non- Indian consumers, however, are subject to such taxation (*see, Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10). In 1988, respondent Department of Taxation and Finance adopted regulations (*see,* 20 NYCRR 336.6, 336.7, 414.6, 414.7) designed to require on-reservation retailers to pay sales and excise taxes upon sales of cigarettes and motor fuel to non-Indian consumers. Cigarette wholesalers doing business on Indian reservations commenced actions to enjoin the States regulatory scheme (*see,* 20 NYCRR 336.6, 336.7) to enforce the collection of sales taxes on cigarettes; however, the actions culminated in a decision by the U.S. Supreme Court in June 1994 (*see, Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros.,* 512 U.S. 61, 114 S.Ct. 2028, 129 L.Ed.2d 52) upholding the State's regulations.

Nevertheless, according to the petition herein, respondent Commissioner of Taxation and Finance has failed to enforce said statutes and regulations. As a consequence, petitioners, trade organizations representing convenience stores and corporations owning and operating retail stores in New York engaged in, *inter alia,* the sale of cigarettes and motor fuel, commenced this CPLR article 78 proceeding seeking to compel respondents to determine, assess and collect cigarette and motor fuel excise and sales taxes relating to sales of those products by on-reservation retailers to non-Indian consumers and otherwise enforce the laws on a uniform basis. Respondents moved to dismiss the petition on the ground that petitioners lack standing to maintain the proceeding, which motion was denied. Thereafter, respondents answered, interposing objections in point of law. Supreme Court treated such objections as a motion for summary judgment and, *inter alia,* granted the petition in all respects. Respondents appeal.

The essential principle of standing is the notion of "injury in fact—an actual legal stake in the matter being adjudicated [which] ensures that the party seeking review has some

concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution "(*Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 772, 570 N.Y.S.2d 778, 573 N.E.2d 1034, quoting *Schlesinger v. Reservists to Stop the War,* 418 US 208, 220-221, 94 S.Ct. 2925, 2932, 41 L.Ed.2d 706), which is "fairly traceable to the defendants acts or omissions" (*Village of Arlington Hgts. v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450). The crux of petitioners argument is that by failing to enforce the subject taxing statutes against on-reservation retailers, State officials are permitting those retailers, with whom petitioners must compete, to purchase cigarette and motor fuel products at lower wholesale prices, which in turn enables them to charge "discount" prices to non-Indian consumers, a fact which respondents have not seriously disputed. We note that the U.S. Supreme Court has found such competitive economic injury cognizable (*see, Clarke v. Securities Indus. Assn.,* 479 U.S. 388, 403, 107 S.Ct. 750, 759, 93 L.Ed.2d 757; *Arnold Tours v. Camp,* 400 U.S. 45, 46, 91 S.Ct. 158, 159, 27 L.Ed.2d 179; *Association of Data Processing Serv. Orgs. v. Camp,* 397 U.S. 150, 151, 90 S.Ct. 827, 829, 25 L.Ed.2d 184; *cf., Matter of United States Catholic Conference,* 2d Cir., 885 F.2d 1020, 1029, *cert. denied* 495 U.S. 918, 110 S.Ct. 1946, 109 L.Ed.2d 309). Accordingly, we find that petitioners have asserted sufficient injury in fact for standing purposes. The determination of standing, however, requires more than a showing of a cognizable injury in fact.

To the principle of injury in fact, courts at both the State and Federal levels have added a rule of self-restraint or "prudential limitation [ ]" (*Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 773, 570 N.Y.S.2d 778, 573 N.E.2d 1034, *supra*), that the interest or injury asserted must fall within "the zone of interests to be protected or regulated by the statute *or constitutional guarantee in question*" (*Association of Data Processing Serv. Orgs. v.*

Camp, supra, at 153, 90 S.Ct. at 830 [emphasis supplied]). Thus, as the Court of Appeals has noted, "competitive injury, of itself, will not confer standing" (*Matter of Dairylea Coop. v. Walkley,* 38 N.Y.2d 6, 11, 377 N.Y.S.2d 451, 339 N.E.2d 865). The competitive injury must be tied either to a statutory purpose, as it was in *Matter of Dairylea Coop. v. Walkley* (*supra*),[1] or to a violation of a constitutional guarantee, as is the case here.

In arguing that petitioners lack standing to maintain this proceeding because they are not within the "zone of interests" intended to be protected by the tax laws (*see,* Tax Law arts. 12-A, 20, 28) and regulations (*see,* 20 NYCRR 336.6, 336.7, 414.6, 414.7), respondents misconstrue the nature of petitioners challenge. Petitioners are not contesting the validity of the subject taxing statutes or an administrative determination rendered in violation of those statutes. Rather, petitioners challenge respondents unequal enforcement of the statutes and regulations. Petitioners argue, *inter alia,* that by their failure to uniformly enforce the mandated collection of taxes, respondents have engaged in discrimination violative of their right to equal protection as guaranteed by the 14th Amendment of the U.S. Constitution.[2] Thus, for standing

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[1] In *Dairylea,* the Court of Appeals stressed that the milk dealers standing to challenge administrative action, which extended the license of a competitor into its sales area, did not derive from competitive injury alone but from the overriding legislative purpose of the statute in question, which was the prevention of destructive competition in the milk industry.

[2] We note in passing that it does not appear that the local municipalities which border the Indian Nations or any other government entity, such as the Comptroller, possess a substantial relationship with petitioners sufficient to entitle them to raise petitioners equal protection claims (*see, Holland v. Illinois,* 493 U.S. 474, 489, 110 S.Ct. 803, 812, 107 L.Ed.2d 905; *Singleton v. Wulff,* 428 U.S. 106, 114-115, 96 S.Ct. 2868, 2874-2875, 49 L.Ed.2d 826; *People v. Kern,* 149 A.D.2d 187, 233, 545 N.Y.S.2d 4, *affd* 75 N.Y.2d 638, 654 n. 3, 555 N.Y.S.2d 647, 554 N.E.2d 1235).

purposes, we must decide whether petitioners injury falls within the zone of interests sought to be protected by that constitutional guarantee.

The Equal Protection Clause prohibits a public authority from applying or enforcing an admittedly valid law in a discriminatory fashion between persons in similar circumstances (*see, Yick Wo v. Hopkins,* 118 U.S. 356, 373-374, 6 S.Ct. 1064, 1072-1073, 30 L.Ed. 220; *Matter of 303 W. 42nd St. Corp. v. Klein,* 46 N.Y.2d 686, 693, 416 N.Y.S.2d 219, 389 N.E.2d 815). In the case before us, it is clear that the failure to enforce the collection of sales and excise taxes on cigarettes and motor fuel sold by on-reservation retailers to non-Indian consumers has resulted in the unequal application of the taxing statutes and regulations to petitioners, who by statute (*see,* Tax Law arts. 12- A, 20, 28), regulation (*see,* 20 NYCRR 336.6, 336.7, 414.6, 414.7) and case law (*see, Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros.,* 512 U.S. 61, 114 S.Ct. 2028, 129 L.Ed.2d 52, *supra*) are entitled to be treated alike (*see, Matter of Di Maggio v. Brown,* 19 N.Y.2d 283, 290, 279 N.Y.S.2d 161, 225 N.E.2d 871).[3]

Although " [t]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation " (*id.,* at 290, 279 N.Y.S.2d 161, 225 N.E.2d 871, quoting *Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446; *see, Matter of 303 W. 42nd St. Corp. v. Klein,* 46 N.Y.2d 686, 695, 416 N.Y.S.2d 219, 389 N.E.2d 815, *supra*), when it is demonstrated, as it has been here, that the selection is based upon a suspect classification such as race, "* * * a State must show that its purpose or interest is both

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[3] Notably, "[b]y whom, when and through what procedure or remedy, taxes shall be collected is a matter for legislative determination, subject to the rule that the procedure cannot be utterly unreasonable or arbitrary or *unequal and unjust in its operation*" (*Gautier v. Ditmar,* 204 N.Y. 20, 28, 97 N.E. 464 [emphasis supplied]).

constitutionally permissible and substantial, and that its use of the classification is "necessary * * * to the accomplishment" of its purpose or the safeguarding of its interest " (*Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 305, 98 S.Ct. 2733, 2756, 57 L.Ed.2d 750, quoting *Matter of Griffths,* 413 U.S. 717, 721-722, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910). Respondents argue that nonenforcement of the taxing statutes against on-reservation retailers has been necessary "to ensure an opportunity for reservation businesses to survive, and to avoid disruptive and potentially violent demonstrations" while they negotiate a diplomatic solution to the problem of collecting taxes from Indian nations and tribes protective of their sovereign status.

Referring to the first proffered reason, we note that it is not constitutionally permissible to "[p]refer[ ] [the] members of any one group for no reason other than race or ethnic origin [for, to do so,] is discrimination for its own sake" (*Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 307, 98 S.Ct. 2733, 2757, 57 L.Ed.2d 750, *supra*). As for the second reason, we acknowledge that protecting citizens from civil disorder is within the legitimate police power of the State (*see, Stotland v. Pennsylvania,* 398 U.S. 916, 920, 90 S.Ct. 1552, 1554, 26 L.Ed.2d 83 [Douglas, J., dissenting]), but note that the exercise of that power is never paramount to the right of equal protection, save in those rare instances where civil disorder "threaten [s] the very existence of the State" (*id.,* at 920, 90 S.Ct. at 1555).

Based upon the above analysis, it is our view that the denial of equal treatment establishes petitioners standing in this equal protection case (*cf., Florida Gen. Contrs. v. Jacksonville,* 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586).[4]

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[4] We note that Supreme Court grounded its determination of standing upon the Court of Appeals decision in *Matter of Dudley v. Kerwick,* 52

With respect to the merits, mindful that "[t]he burden of proving a claim of discriminatory enforcement is a weighty one" (*Matter of 303 W. 42nd St. Corp. v. Klein, supra,* at 694, 416 N.Y.S.2d 219, 389 N.E.2d 815), we nevertheless are satisfied that petitioners have met their burden as a matter of law. They have shown, upon the record before this court, that "a grossly disproportionate incidence of nonenforcement against others similarly situated" exists [5] and that "the only reasonable explanation for the pattern of nonenforcement" (*id.,* at 695, 416 N.Y.S.2d 219, 389 N.E.2d 815) is a discriminatory purpose on the part of respondents, which, even though intended as benign (*see, Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 294, 98 S.Ct. 2733, 2750, 57 L.Ed.2d 750, *supra*), is based upon the impermissible standard of race.

We turn next to respondents contention that Supreme Court abused its discretion in ordering, albeit as alternative relief, [6]

N.Y.2d 542, 439 N.Y.S.2d 305, 421 N.E.2d 797. In that case, the court implicitly granted standing, without addressing the issue, when it upheld a real property taxpayers right to challenge, in a CPLR article 78 proceeding, the action of a local assessor in granting wholesale religious exemptions to 88% of a towns landowners. While it can be argued that the type of inaction on the part of the State in the subject case is different from the governmental action challenged in *Dudley* (*see, id.; see also, Matter of New York State Assn. of Tobacco & Candy Distribs. v. New York Tax Appeals Tribunal,* 159 A.D.2d 132, 559 N.Y.S.2d 592), we do not need to consider the import of *Dudley* in the case at hand due to our conclusion that petitioners have satisfied the traditional "zone of interest" test.

[5] We note that respondents submissions in this record, particularly the "Important Notice N-94-16", establish their awareness of the deliberate nonenforcement of the tax collection laws on the Indian reservations; although respondents intended to implement enforcement on December 1, 1994, it is clear that no enforcement occurred prior to the argument of this appeal.

[6] Supreme Court allowed respondents 120 days, which they indicated would be necessary, to implement and enforce the subject tax laws and regulations equally on all to whom they were applicable.

the State-wide suspension of respondents collection and enforcement of the sales and excise taxes on motor fuel and tobacco. While it is arguably true that petitioners right to equal treatment can be attained either by requiring the collection and enforcement of the subject tax laws and regulations against on-reservation retailers or suspending collection and enforcement State-wide,[7] petitioners demand for relief in their petition was limited to the former. Therefore, it was error for Supreme Court to have awarded such sweeping, undemanded relief without adequate notice of its intent to do so (*see, Matter of Were Assocs. Co. v. Scaduto,* 206 A.D.2d 245, 619 N.Y.S.2d 727).

WHITE and CASEY, JJ., concur.

CREW, Justice (dissenting).

We respectfully dissent. In order to establish standing, petitioners must demonstrate that they have suffered an injury in fact, that such injury falls within the zone of interest that the underlying statute aims to protect or promote and that the injury alleged is different in degree or kind from that suffered by the general public (*see, e.g., Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 570 N.Y.S.2d 778, 573 N.E.2d 1034).

We agree with the majority that petitioners have suffered an injury in fact, inasmuch as they claim that respondents failure to enforce the statutes and regulations at issue have

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[7] We note the possibility of an alternative means (other than the current regulatory systems) which may provide petitioners with the level "playing field" they seek for sales to non-Indian consumers. "States may * * * enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of [sales and excise] tax[es]" (*Oklahoma Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514, 111 S.Ct. 905, 912, 112 L.Ed.2d 1112). While this court understands that the State has been engaged in negotiations of this nature, this court is bound by the record before it.

placed them at a competitive disadvantage in relation to on-reservation retailers, resulting in a substantial loss of revenue. However, the Court of Appeals has made it clear that business competitive injury is insufficient to confer standing under the zone of interest requirement unless the statute in question is aimed at preventing disruptive competition (*see, Matter of Dairylea Coop. v. Walkley,* 38 N.Y.2d 6, 377 N.Y.S.2d 451, 339 N.E.2d 865). Here, the relevant statutes and regulations unquestionably are designed to provide revenue for the State and local governments (*see,* Mem. of Division of Budget, 1965 N.Y. Legis. Ann., at 432, 434) and any effect that such statutes and regulations may have upon competition is merely incidental to those goals (*see, Matter of Blue Cross of W. N.Y. v. Cooper,* 164 A.D.2d 578, 580-581, 564 N.Y.S.2d 866; *Arnot- Ogden Mem. Hosp. v. Guthrie Clinic,* 122 A.D.2d 413, 414-415, 505 N.Y.S.2d 232, *lv. denied* 68 N.Y.2d 612, 510 N.Y.S.2d 1027, 503 N.E.2d 124). Accordingly, petitioners have not established that their in-fact injury falls within the concerns sought to be promoted by the subject statutes and regulations and have, therefore, failed to establish standing on this basis.

To the extent that petitioners assert that they have taxpayer standing under *Boryszewski v. Brydges,* 37 N.Y.2d 361, 372 N.Y.S.2d 623, 334 N.E.2d 579, we cannot agree. In *Boryszewski,* which dealt with the ability of a taxpayer to challenge the constitutionality of a State statute providing lump-sum "lulus" in lieu of expenses for members of the Legislature, the Court of Appeals concluded that standing would be recognized in instances where "the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action" (*id.,* at 364, 372 N.Y.S.2d 623, 334 N.E.2d 579). No such barrier exists here.

One of the cornerstones of the Court of Appeals decision in *Boryszewski* was that it was unrealistic to expect a State

official to step forward to challenge the constitutionality of a statute that, in the case of the Attorney-General, he or she was obligated to defend or, in the case of an individual member of the Legislature, from which he or she stood to benefit. Here, however, even assuming that one could not rely upon the Attorney-General or the Legislature to seek enforcement of the underlying statutes, to the extent that the State is being deprived of tax revenues, surely the Comptroller would have the incentive to intervene, as would the affected local governments. Thus, this matter is distinguishable from *Boryszewski* and petitioners have not, in our view, established standing under the principles set forth therein.

In spite of the foregoing, petitioners maintain and Supreme Court found that the holding in *Matter of Dudley v. Kerwick*, 52 N.Y.2d 542, 439 N.Y.S.2d 305, 421 N.E.2d 797, confers standing upon petitioners.[8] We disagree. Although we acknowledge that *Dudley* has gained limited recognition as a "standing" case (*see, Matter of New York State Assn. of Tobacco & Candy Distribs. v. New York Tax Appeals Tribunal*, 159 A.D.2d 132, 136, 559 N.Y.S.2d 592; *Matter of Gordon v. Marrone*, 151 Misc. 2d 164, 166-167, 573 N.Y.S.2d 105; *Matter of Campbell Oil Co. v. Chu*, 127 Misc.2d 281, 283-284, 485 N.Y.S. 2d 948), it is important to note that *Dudley* contains no standing analysis whatsoever. In this regard, although *Dudley* makes passing reference to the Court of Appeals decision in *Boryszewski v. Brydges*, 37 N.Y.

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[8] Our learned colleagues forego analysis of the *Dudley* case upon the basis that petitioners are not contesting an administrative determination made in violation of the statutes and regulations in question. We disagree. The petition specifically recites that respondents have failed to enforce said statutes and regulations resulting in a substantial loss of State revenues, as well as placing petitioners at a competitive disadvantage, and seeks injunctive relief compelling respondents to enforce the subject statutes and regulations. Quite clearly, petitioners are assailing respondents determination not to enforce the statutes and regulations at issue.

2d 361, 372 N.Y.S. 2d 623, 334 N.E. 2d 579, *supra*, and recognizes the then-recent trend of "liberalizing the ability of taxpayers to challenge governmental action" (*Matter of Dudley v. Kerwick, supra,* at 551, 439 N.Y.S. 2d 305, 421 N.E. 2d 797), it is unclear whether the standing implicitly found in *Dudley* was based upon the "impenetrable barrier to suit" doctrine set forth in *Boryszewski* or, instead, was grounded upon the "zone of interest" test recognized by the Court of Appeals in *Matter of Dairylea Coop. v. Walkley,* 38 N.Y.2d 6, 377 N.Y.S.2d 451, 339 N.E.2d 865, *supra,* and subsequently reaffirmed in *Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 570 N.Y.S.2d 778, 573 N.E.2d 1034, *supra.* Whatever the basis for the standing implicitly found to be present in *Dudley,* however, we would not be inclined to hold, absent some clear indication from the Court of Appeals, that *Dudley* automatically confers standing upon a petitioner who could not otherwise satisfy either the "impenetrable barrier to suit" or the "zone of interest" test simply because that petitioner has alleged that some sort of blanket exemption from taxation has been granted, which is precisely what petitioners contend has occurred here.

Nor are we persuaded by the majority that standing may be found based upon an alleged violation of the 14th Amendment of the U.S. Constitution. Assuming, arguendo, that the case at bar is amenable to an equal protection analysis, we take issue with the majoritys conclusion that petitioners have established, as a matter of law, a grossly disproportionate incidence of nonenforcement against others similarly situated and, further, that the *only* reasonable explanation for the nonenforcement of the subject statutes and regulations is based upon the impermissible standard of race (*see, Matter of 303 West 42nd St. Corp. v. Klein,* 46 N.Y.2d 686, 693, 416 N.Y.S.2d 219, 389 N.E.2d 815). Nowhere in petitioners submissions is there any statistical data to establish a grossly disproportionate incidence of nonenforcement. Additionally, petitioners, who bore the burden of

establishing discriminatory enforcement (*see, id.*, at 694, 416 N.Y.S.2d 219, 389 N.E.2d 815), offered no explanation whatsoever for the stated nonenforcement. Indeed, the only explanation contained in the record for nonenforcement of the subject provisions was proffered by respondents, to wit, that the State has endeavored to negotiate this issue with the Indian nations and tribes who, in turn, were reluctant to deal directly with the State absent the participation of the Federal Government, thereby compelling the State to observe diplomatic protocols to the same extent as would be necessary in an international negotiation with a foreign nation. An additional factor pointed to by respondents for their failure to precipitously enforce the aforesaid statutes and regulations has to do with the disruptive and potentially violent demonstrations that have resulted from similar enforcements in the past and which, indeed, are taking place as of this writing. Accordingly, we do not believe that petitioners have sustained their heavy burden of proving a claim of discriminatory enforcement. In any event, even assuming that petitioners made a prima facie showing of invidiously motivated selective enforcement, in considering the merits of such a claim an evidentiary hearing is mandated (*see, id.*, at 693, 416 N.Y.S.2d 219, 389 N.E.2d 815).

Accordingly, we would reverse the judgment of Supreme Court and dismiss the petition.

ORDERED that the judgments are modified, on the law, without costs, by deleting so much thereof as provided for the State-wide suspension of the enforcement and collection of the sales and excise taxes on motor fuel and tobacco, and, as so modified, affirmed.

CARPINELLO, J., concurs.

APPENDIX E

United States Constitution
Article XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 282. Definitions

As used in this article,

1. a. With respect to motor fuel, "distributor" means any person, firm, association or corporation, who or which imports or causes to be imported into the state, for use, distribution, storage or sale within the state, any motor fuel; and also any person, firm, association or corporation who or which produces, refines, manufactures or compounds motor fuel within the state.

b. With respect to Diesel motor fuel, "distributor" means any person, firm, association or corporation (i) who or which imports or causes to be imported into the state, for use, distribution, storage or sale within the state, any Diesel motor fuel; (ii) who or which produces, refines, manufactures or compounds Diesel motor fuel within the state; (iii) who or which engages in the enhancement of Diesel motor fuel in this state; (iv) who or which makes a sale or use of Diesel motor fuel in this state other than: (A) a retail sale not in bulk or (B) the self-use of Diesel motor fuel which has been the subject of a retail sale to such person; (v) who or which is registered by the department of taxation and finance as a distributor of kero-jet fuel pursuant to the provisions of subdivision two of section two hundred eighty-two-a of this article. For the purposes of this article when used with respect to Diesel motor fuel, a "retail sale not in bulk" means the making or offering to make any sale of Diesel motor fuel to a consumer of such fuel which is delivered directly into a motor vehicle for use in the operation of such vehicle. A "retail sale in bulk" means the making or offering to make any sale of Diesel motor fuel to a consumer which is other than a "retail

sale not in bulk". Motor fuel or Diesel motor fuel brought into the state in the ordinary fuel tank connecting with the engine of a motor vehicle, aeroplane, motor boat or other conveyance propelled by the use of such motor fuel or Diesel motor fuel, and to be used only in the operation thereof, shall not be deemed imported within the meaning of this article, if not removed from such tank except as used in the propulsion of such engine.

2. "Motor fuel" means gasoline, benzol or other product, except kerosene and crude oil, which is suitable for use in operation of a motor vehicle engine, but if kerosene or crude oil is compounded or mixed with any other product or products, and the resulting compound or mixture is suitable for use in the operation of any such motor vehicle engine, such resulting compound or mixture in its entirety shall be a "motor fuel."

3. "Motor vehicle" means any vehicle propelled by any power other than muscular, except boats, road building machinery, power shovels, tractor cranes, tractors used exclusively for agricultural purposes and such vehicles as are run only on rails or tracks.

4. "Purchaser" shall include, in addition to its usual meaning, the distributor in the case of transfer of motor fuel by a distributor from his, their or its stock, into a motor vehicle, or into a container from which motor fuel is supplied by the distributor to a motor vehicle or vehicles of the distributor or of others.

5. "Sale" shall include, in addition to its meaning under article twenty-eight of this chapter, the transfer of fuel by a distributor into a motor vehicle or into a receptacle from which fuel is supplied by him or it to his or its own or other motor vehicles.

6. "Filling station" shall include any place, location or station where motor fuel or Diesel motor fuel is offered for sale at retail.

7. "Owner" shall include any person offering motor fuel for sale at retail.

8. "Person" includes an individual, copartnership, limited liability company, society, association, corporation, joint stock company, and any combination of individuals and also an executor, administrator, receiver, trustee or other fiduciary.

9. "Omnibus carrier" shall mean every person engaged in operating an omnibus line subject to the supervision of the state department of public service under article three-a of the public service law, including every person operating omnibuses used for the transportation of school children under a contract made pursuant to the provisions of the education law.

10. "Taxicab licensee" shall mean every corporation, company, association, partnership and person engaged in operating a taxicab, as defined in section one hundred forty-eight-a of the vehicle and traffic law, and licensed by local authorities as defined in section one hundred twenty-two of such law to operate at a fixed rate of fare.

11. "Nonpublic school operator" shall mean any nonpublic elementary or secondary school which owns or leases and operates any vehicle solely and exclusively for its purposes.

12. "Transporter" means any person who or which has the use or control, or the right to the use or control of any means of transportation used in transporting motor fuel including a barge, truck or pipeline. "Importing transporter" means any transporter who or which transports motor fuel in the state where such motor fuel is being imported into the state for use, distribution, storage or sale in the state. "Exporting transporter" means any transporter who or which transports motor fuel in this state where such motor fuel is being exported from a point in this state to without this state.

13. "Terminal" means a motor fuel storage facility with a storage capacity of fifty thousand gallons or more excluding such facility at which motor fuel is stored solely for its retail sale at such facility. "Terminal operator" means any person who or which has the use of or control over, or the right to so use or control, a terminal.

14. "Diesel motor fuel" shall mean kerosene, crude oil, fuel oil or other middle distillate and also motor fuel suitable for use in the operation of an engine of the diesel type, excluding, however, any product specifically designated "No. 4 Diesel fuel" and not suitable as a fuel used in the operation of a motor vehicle engine.

15. "Automotive fuel" shall mean motor fuel or Diesel motor fuel.

16. "Enhancement" when used in this article with respect to Diesel motor fuel shall mean the addition or blending of kerosene or any other substance or additive, such as a cetane improver, to or with fuel oil or other middle distillate which improves or enhances such middle distillate's performance in the operation of a motor vehicle engine of the diesel type, provided, enhancement shall not include the production of fuel oil by the addition of a substance to number two fuel oil for the purpose of lowering the cloud point or pour point of such product to that of generally accepted industry standards for number two fuel oil and such resulting product is invoiced and sold, in good faith, by the producer thereof as number two fuel oil. "Enhanced Diesel motor fuel" shall mean the combined or blended product which has resulted from the act of enhancement (not the purchase of the ingredients to make the blend) and any product specifically designated "Diesel fuel" or "No. 1 Diesel fuel" or "No. 2 Diesel fuel" or any like industry designation commonly used to refer to a fuel used in the operation of a motor vehicle engine of the Diesel type which meets standard industry specifications for such fuel as to flash point, water and sediment content, distillation, sulfur

content, copper corrosion and cetane, such as the specifications contained in American Standard Testing Material Specification D975, as amended through January first, nineteen hundred eighty-eight.

17. "Fixed base operator" means any person, firm, association or corporation, who or which engages in the sale of kero-jet fuel or aviation gasoline, or both, for [fig 1] airplanes from a fixed and permanent place at an airport within the state.

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 282-a. Imposition of excise tax on Diesel motor fuel

1. There is hereby levied and imposed with respect to Diesel motor fuel an excise tax of [fig 1] four cents per gallon upon the sale or use of Diesel motor fuel in this state.

The excise tax is imposed on the first sale or use of Diesel motor fuel to occur which is not exempt from tax under this article. Provided, however, if the tax has not been imposed prior thereto, it shall be imposed on the delivery of Diesel motor fuel to a filling station or into the fuel tank connecting with the engine of a motor vehicle for use in the operation thereof whichever event shall be first to occur. The tax shall be computed based upon the number of gallons of Diesel motor fuel sold or used or the number of gallons of Diesel fuel delivered into the fuel tank of a motor vehicle, as the case may be. Nothing in this article shall be construed to require the payment of such excise tax more than once upon the same Diesel motor fuel. Nor shall the collection of such tax be made applicable to the sale or use of Diesel motor fuel under circumstances which preclude the collection of such tax by reason of the United States constitution and of laws of the United States enacted pursuant thereto. Provided, further, no Diesel motor fuel shall be included in the measure of the tax unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution. All tax for the period for which a return is required to be filed shall be due on the date limited for the filing of the return for such period, regardless of whether a return is filed as required by this article or whether the return which is filed correctly shows the amount of tax due.

2. No person shall engage within this state in the enhancement of Diesel motor fuel, make a sale or use of Diesel motor

fuel (other than a retail sale not in bulk or self-use of Diesel motor fuel which has been the subject of a retail sale), import or cause the importation of Diesel motor fuel into the state or produce, refine, manufacture or compound Diesel motor fuel within the state unless such person shall be registered by the department of taxation and finance as a distributor of Diesel motor fuel. Provided, the commissioner of taxation and finance shall not register as a distributor of Diesel motor fuel any person who is engaged solely in one or both of the following: (i) any person who makes or offers to make a retail sale not in bulk of such fuel or (ii) any person who purchases Diesel motor fuel in bulk in this state for the sole purpose of self-use. The commissioner may, however, Register as a distributor of kero-jet fuel only a fixed base operator who makes no sales of kero-jet fuel other than retail sales not in bulk delivered directly into the fuel tank of an airplane for use in the operation of such airplane and who makes no other sales of diesel motor fuel. Such registration shall apply only to the wholesale purchase of kero-jet fuel and the retail sale of such fuel not in bulk for delivery directly into the fuel tank of an airplane for use in the operation thereof. Provided, further, that if the commissioner is satisfied that full registration is not necessary in order to protect tax revenues, the commissioner may limit or modify the requirement of registration as a distributor with respect to any person otherwise required to register solely because such person engages in the sale of Diesel motor fuel where such person makes sales of Diesel motor fuel to the consumer solely for the purposes described in subparagraph (i) of paragraph (b) of subdivision three of this section provided that if the commissioner so limits or modifies such registration requirement with respect to such person, then such registration shall apply only to the importation, sale and distribution of Diesel motor fuel for the purposes described in such subparagraph (i). The commissioner of taxation and finance may also waive any other requirement imposed by this article on such a

distributor. All the provisions of section two hundred eighty-three of this article shall apply to applicants for registration and registrants with respect to Diesel motor fuel, and, in addition, distributors with respect to Diesel motor fuel shall be subject to all other provisions of this article relating to distributors of motor fuel, including but not limited to, the keeping of records, the fixing, determination and payment of tax and filing of returns.

3. (a) The tax imposed by this section shall not apply to the sale of untaxed Diesel motor fuel to or the use of such fuel by an organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter where such Diesel motor fuel is used by such organization for its own use or consumption.

(b) The tax on the incident of sale or use imposed by subdivision one of this section shall not apply to: (i) the sale to or use by the consumer of previously untaxed Diesel motor fuel which is not enhanced Diesel motor fuel and which is used exclusively for heating purposes or for the purpose of use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, but only if all of such fuel is consumed other than on the highways of this state; provided, however, this exemption shall in no event apply to a sale of Diesel motor fuel which involves a delivery at a filling station or into a repository which is equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle; or (ii) the sale of previously untaxed Diesel motor fuel which is not enhanced Diesel motor fuel to a person registered under this article as a distributor of Diesel motor fuel other than (A) a retail sale to such person or (B) a sale to such person which involves a delivery at a filling station or into a repository which is equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle; or (iii) a sale or use of enhanced

Diesel motor fuel to or by a consumer exclusively for the purposes of heating specified in subparagraph (i) of this paragraph but only if such enhanced Diesel motor fuel is delivered into a storage tank which is not equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle and such storage tank is attached to the heating unit burning such fuel, provided that each delivery of such fuel of over four thousand five hundred gallons shall be evidenced by a certificate signed by the purchaser stating that the product will be used exclusively for heating purposes; or (iv) a sale or use consisting of no more than four thousand five hundred gallons of Diesel motor fuel in a thirty-day period to or by a consumer who purchases or uses such fuel for use or consumption directly and exclusively in the production for sale of tangible personal property by farming but only if all of such fuel is delivered on the farm site and is consumed other than on the highways of this state (except for the use of the highway to reach adjacent farmlands) provided, however, a farmer may purchase more than four thousand five hundred gallons of Diesel motor fuel in a thirty-day period for such use or consumption exempt from the tax in accordance with prior clearance given by the commissioner of taxation and finance; or (v) a sale to the consumer consisting of not more than twenty gallons of water-white kerosene to be used and consumed exclusively for heating purposes; or (vi) the sale to or delivery at a filling station or other retail vendor of water-white kerosene provided such filling station or other retail vendor only sells such water-white kerosene exclusively for heating purposes in containers of no more than twenty gallons; or (vii) a sale of kero-jet fuel to an airline for use in its airplanes or a use of kero-jet fuel by an airline in its airplanes; or (viii) a sale of kero-jet fuel by a registered distributor of Diesel motor fuel to a fixed base operator registered under this article as a distributor of kero-jet fuel only where such fixed base operator is engaged solely in making or offering to make

retail sales not in bulk of kero-jet fuel directly into the fuel tank of an airplane for the purpose of operating such airplane; or (ix) a retail sale not in bulk of kero-jet fuel by a fixed base operator registered under this article as a distributor of kero-jet fuel only where such fuel is delivered directly into the fuel tank of an airplane for use in the operation of such airplane.

4. The tax imposed by this section on Diesel motor fuel shall be passed through by the seller and included as part of the selling price to each purchaser of such fuel. Provided, however, the amount of the tax imposed by this section may be excluded from the selling price of Diesel motor fuel where (i) a sale of Diesel motor fuel is made to an organization described in paragraph (a) of subdivision three of this section solely for the purpose stated therein; (ii) a sale of enhanced Diesel motor fuel is made to a consumer exclusively for the purposes of heating specified in subparagraph (i) of paragraph (b) of subdivision three of this section but only if such enhanced Diesel motor fuel is delivered into a storage tank which is not equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle and such storage tank is attached to the heating unit burning such fuel, provided that each delivery of such fuel of over four thousand five hundred gallons shall be evidenced by a certificate signed by the purchaser stating that the product will be used exclusively for heating purposes; (iii) a sale is made consisting of no more than four thousand five hundred gallons (or a greater amount which has been given prior clearance by the commissioner of taxation and finance) of Diesel motor fuel in a thirty-day period to a consumer who purchases such fuel for use or consumption directly and exclusively in the production for sale of tangible personal property by farming but only if all of such fuel is consumed other than on the highways or waterways of this state; or (iv) the sale to or delivery at a filling station or other retail vendor of water-white kerosene provided such filling station or other retail vendor only sells such water-white kerosene exclusively

for heating purposes in containers of no more than twenty gallons; or (v) a sale of kero-jet fuel is made to an airline for use in its airplanes.

5. All the provisions of this article relating to the administration and collection of the taxes on motor fuel, except sections two hundred eighty-three-a and two hundred eighty-three-b of this article, shall be applicable to the tax imposed by this section with such limitation as specifically provided for in this article with respect to Diesel motor fuel and with such modification as may be necessary to adapt the language of such provisions to the tax imposed by this section. With respect to the bond or other security required by subdivision three of section two hundred eighty-three of this article, the commissioner of taxation and finance, in determining the amount of bond or other security required for the purpose of securing tax payments, shall take into account the volume of heating fuel and other Diesel motor fuel sold for exempt purposes by a distributor of Diesel motor fuel during prior periods as a factor reducing potential tax liability along with any other relevant factors in determining the amount of security required. With respect to the bond required to be filed prior to registration as a Diesel motor fuel distributor, no bond shall be required of an applicant upon a finding of the applicant's fiscal responsibility, as reflected by such factors as net worth, current assets and liabilities, and tax reporting and payment history, and the department shall not provide for a minimum bond of every applicant.

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 282-b. Additional Diesel motor fuel tax

In addition to the tax imposed by section two hundred eighty-two-a of this chapter, a like tax shall be imposed at the rate of three cents per gallon upon sale or use within the state of Diesel motor fuel or upon the delivery of Diesel motor fuel to a filling station or into the fuel tank of a motor vehicle for use in the operation thereof. Except as otherwise provided in this section, all of the provisions of this article shall apply with respect to the additional tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-two-a. Beginning on April first, nineteen hundred ninety-one, four and one-sixth per centum of the moneys received by the department [fig 1] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred ninety-one, four and one-sixth per centum of the moneys received by the department [fig 2] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine-a of the state finance law. Beginning on April first, nineteen hundred ninety-two, an additional eight and one-third per centum of the moneys received by the department [fig 3] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine of the state finance law. Beginning on April first,

nineteen hundred ninety-two, an additional eight and one-third per centum of the moneys received by the department [fig 4] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine-a of the state finance law. Beginning on April first, two thousand one, seventy-five per centum of the moneys received by the department pursuant to the provisions of this section shall be deposited in the dedicated fund accounts pursuant to subdivision (d) of section three hundred one-j of this chapter. Beginning on April first, two thousand three, all of the moneys received by the department pursuant to the provisions of this section shall be deposited in the dedicated fund accounts pursuant to subdivision (d) of section three hundred one-j of this chapter.

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 282-c. Supplemental Diesel motor fuel tax

In addition to the taxes imposed by sections two hundred eighty-two-a and two hundred eighty-two-b of this chapter, a like tax shall be imposed at the rate of one cent per gallon upon the sale or use within the state of Diesel motor fuel or upon the delivery of Diesel motor fuel to a filling station or into the fuel tank of a motor vehicle for use in the operation thereof. Except for paragraph (b) of subdivision three of section two hundred eighty-nine-c, all the provisions of this article shall apply with respect to the supplemental tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-two-a. On and after the first day of October, nineteen hundred seventy-two, twenty-five per centum of the monies received by the department [fig 1] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund established pursuant to the provisions of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred eighty-three, twenty-five per centum of the monies received by the department [fig 2] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund established pursuant to the provisions of section eighty-nine-a of the state finance law. Beginning on April first, nineteen hundred ninety, an additional twelve and one-half per centum of the moneys received by the department [fig 3] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred

ninety, an additional twelve and one-half per centum of the moneys received by the department [fig 4] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine-a of the state finance law. Beginning on April first, nineteen hundred ninety-one, an additional twelve and one-half per centum of the moneys received by the department [fig 5] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred ninety-one, an additional twelve and one-half per centum of the moneys received by the department [fig 6] pursuant to the provisions of this section shall be deposited to the credit of the emergency construction and reconstruction fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine-a of the state finance law. Beginning on April first, two thousand three, all of the moneys received by the department pursuant to the provisions of this section shall be deposited in the dedicated fund accounts pursuant to subdivision (d) of section three hundred one-j of this chapter.

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 284. Tax imposed

1. There is hereby levied and imposed an excise tax of four cents per gallon upon motor fuel (a) imported into or caused to be imported into the state by a distributor for use, distribution, storage or sale in the state or upon motor fuel which is produced, refined, manufactured or compounded by a distributor in the state (which acts shall hereinafter in this subdivision be encompassed by the phrase "imported or manufactured") or (b) if the tax has not been imposed prior to its sale in this state, which is sold by a distributor (which act, in conjunction with the acts described in paragraph (a) of this subdivision, shall hereinafter in this article be encompassed by the phrase "imported, manufactured or sold"), except when imported, manufactured or sold under circumstances which preclude the collection of such tax by reason of the United States constitution and of laws of the United States enacted pursuant thereto or when imported or manufactured by an organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision for its own use or consumption and except kero-jet fuel when imported or manufactured by an airline for use in its airplanes. Provided, further, no motor fuel shall be included in the measure of the tax unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution. All tax for the period for which a return is required to be filed shall be due on the date limited for the filing of the return for such period, regardless of whether a return is filed by such distributor as required by this article or whether the return which is filed correctly shows the amount of tax due.

2. If, prior to April first, nineteen hundred forty-seven, a contract of sale of motor fuel shall have been made, and delivery thereof pursuant to such contract is made within the state thereafter, from a stock of motor fuel which, at the time of the taking of such fuel therefrom for such delivery, is subject to the taxing power of the state, the vendor shall be deemed a distributor, for the purposes of this article, and such motor fuel shall be deemed to be sold, and shall be subject to such tax, at the time of such delivery.

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 284-a. Additional motor fuel tax

In addition to the tax imposed by section two hundred eighty-four of this chapter, a like tax shall be imposed at the rate of three cents per gallon upon motor fuel imported, manufactured or sold within this state by a distributor. Except as otherwise provided in this section, all the provisions of this article except subdivision two of section two hundred eighty-nine-e of this article shall apply with respect to the additional tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-four. Beginning on April first, nineteen hundred ninety-one, four and one-sixth per centum of the moneys received by the department [fig 1] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred ninety-one, four and one-sixth per centum of the moneys received by the department [fig 2] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine-a of the state finance law. Beginning on April first, nineteen hundred ninety-two, an additional eight and one-third per centum of the moneys received by the department [fig 3] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine of the state finance law. Beginning on April first,

nineteen hundred ninety-two, an additional eight and one-third per centum of the moneys received by the department [fig 4] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine-a of the state finance law. Beginning on April first, two thousand, seventy-five per centum of the moneys received by the department pursuant to the provisions of this section shall be deposited in the dedicated fund accounts pursuant to subdivision (d) of section three hundred one-j of this chapter. Beginning on April first, two thousand three, all of the moneys received by the department pursuant to the provisions of this section shall be deposited in the dedicated fund accounts pursuant to subdivision (d) of section three hundred one-j of this chapter.

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 284-c. Supplemental motor fuel tax

In addition to the taxes imposed by sections two hundred eighty-four and two hundred eighty-four-a of this chapter, a like tax shall be imposed at the rate of one cent per gallon upon motor fuel imported, manufactured or sold within this state by a distributor. Except for paragraph (b) of subdivision three of section two hundred eighty-nine-c, all the provisions of this article shall apply with respect to the supplemental tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-four. On and after the first day of October, nineteen hundred seventy-two, twenty-five per centum of the monies received by the department [fig 1] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund established pursuant to the provisions of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred eighty-three, twenty-five per centum of the monies received by the department [fig 2] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund established pursuant to the provisions of section eighty-nine-a of the state finance law. Beginning on April first, nineteen hundred ninety, an additional twelve and one-half per centum of the monies received by the department [fig 3] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred ninety, an additional twelve and one-half per centum of the moneys received by the department [fig 4] pursuant to the

provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine-a of the state finance law. Beginning on April first, nineteen hundred ninety-one, an additional twelve and one-half per centum of the moneys received by the department [fig 5] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred ninety-one, an additional twelve and one-half per centum of the moneys received by the department [fig 6] pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund reserve account established pursuant to the provisions of paragraph (b) of subdivision two of section eighty-nine-a of the state finance law. Beginning on April first, two thousand three, all of the moneys received by the department pursuant to the provisions of this section shall be deposited in the dedicated fund accounts pursuant to subdivision (d) of section three hundred one-j of this chapter.

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 285. Special provision as to imposition of tax on certain motor fuel

If a person, firm, association or corporation shall receive any motor fuel in such form and under such circumstances as shall preclude the collection of such tax from a distributor by reason of the constitution and laws of the United States, and shall thereafter sell any such fuel in such manner and under such circumstances as may subject the fuel sold to the taxing power of this state, such person, firm, association or corporation shall be considered a distributor, with respect to such sale, and shall make the same reports, pay the same taxes and be subject to all other provisions of this article relating to distributors.

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 285-a. Presumption of taxability

1. No person shall purchase motor fuel in this state, excluding a purchase at retail, unless the taxes imposed by this article have been assumed by a distributor registered under this article in accordance with a certification under subdivision three of this section or paid by such distributor, and, in each of such instances, are passed through to such purchaser. In addition to any other civil and criminal penalties which may apply, any person who purchases motor fuel without having received a certification from the seller in accordance with subdivision three of this section shall be jointly and severally liable to pay the taxes imposed by this article with respect to such motor fuel.

2. For the purpose of the proper administration of this article and to prevent evasion of the tax on motor fuel imposed by and pursuant to this article, it shall be presumed that all motor fuel imported, manufactured or sold, received or possessed in the state is intended for use, distribution, storage or sale in the state and subject to the taxes imposed by this article until the contrary is established. It shall be further presumed that all motor fuel so imported, manufactured or sold, received or possessed in the state by any person, other than motor fuel delivered into the ordinary fuel tank connected with the engine of a means of conveyance in order to propel it, or in small drums or similar containers, which such person cannot otherwise account for, is subject to the taxes imposed by this article and such person is responsible for payment of such taxes. Provided, however, a distributor of motor fuel who imports, manufactures or sells and stores in the state or who purchases and stores motor fuel in the state on which he has paid the taxes imposed by this article shall be

allowed an adjustment in arriving at the gallons subject to the taxes imposed by such section on account of the gallons the distributor establishes were lost due to shrinkage, evaporation and handling; provided, however, such allowance shall not exceed two percent of the fuel stored. Provided, further, that in arriving at the gallons of motor fuel subject to the taxes imposed by this article, there shall be allowed an adjustment on account of gallons lost or destroyed due to an accident, such as fire, and at the time of such loss or destruction were being held or transported for sale other than at retail. The burden of proving that any motor fuel is not so subject shall be upon the person so responsible for such payment with respect to such fuel.

3. (a) Upon each sale of motor fuel, other than a sale at retail, the seller must give to the purchaser and the purchaser shall receive at the time of delivery of such motor fuel, a certification containing such information as the tax commission shall require which shall include a statement to the effect: (i) if such seller is a distributor registered under this article, that he assumed the payment of or paid the taxes imposed by this article and, in each case, is passing through such taxes; or (ii) that such seller is passing through such taxes which were so previously assumed or paid by an identified distributor registered under this article, and passed through to him.

(b) If the certification required by this subdivision has been furnished to the purchaser at delivery and accepted in good faith, the burden of proving that the taxes imposed by this article were assumed or paid by a distributor registered as such under this article and passed through shall be solely on the seller.

(c) Where the certification required under this paragraph is not furnished by the seller at delivery of motor fuel, it shall be presumed that the taxes imposed by this article have not been assumed or paid by a distributor registered as

such under this article and that the purchaser in such case is jointly and severally liable for such taxes.

(d) If, due to the circumstances of delivery, it is not possible to issue a certification required under this subdivision at the time of delivery of motor fuel, the tax commission may authorize the delivery of the certification required under this paragraph at a time after the delivery of the motor fuel which is the subject of the sale under the limited circumstances it shall prescribe and upon such terms and conditions it shall deem necessary to ensure collection of the taxes imposed by this article and the tax imposed by section eleven hundred two of this chapter.

NEW YORK TAX LAW

ARTICLE 12-A. TAX ON GASOLINE AND SIMILAR MOTOR FUEL

§ 285-b. Presumption of taxability—Diesel motor fuel

1. Except with respect to the exemptions from the excise tax on Diesel motor fuel set forth in subdivision three of section two hundred eighty-two-a of this article, no person shall purchase Diesel motor fuel in this state unless the taxes imposed by this article have been assumed by a registered distributor of Diesel motor fuel in accordance with a certification under subdivision four of this section or paid by such distributor and, in each of such instances, except in the case of an exemption from the pass through of such tax authorized in subdivision four of such section two hundred eighty-two-a, are passed through to such purchaser. In addition to any other civil and criminal penalties which may apply, any person who purchases Diesel motor fuel without having received a certification from the seller in accordance with subdivision four of this section shall be jointly and severally liable to pay the taxes imposed by this article with respect to such Diesel motor fuel.

2. For purposes of the proper administration of this article and to prevent evasion of the taxes imposed on Diesel motor fuel by this article, it shall be presumed that all Diesel motor fuel sold, received or possessed in the state is subject to the taxes imposed by this article until the contrary is established. It shall be further presumed that any person so selling, receiving or possessing such Diesel motor fuel is responsible for payment of the excise taxes on such fuel.

3. (a) The claim for or exemption from tax provided for in subparagraphs (i), (iii), (iv), (v), (vi), (vii) and (ix) of paragraph (b) of subdivision three of section two hundred eighty-two-a of this article shall be established by means of an exempt transaction certificate. If any such exemption is

applicable, such certificate shall be provided by the purchaser to the seller at the time of or prior to delivery of the Diesel motor fuel. Such exempt transaction certificate shall set forth the name and address of the purchaser and the basis of the exemption and shall be signed by such purchaser and by the seller. Such certificate shall be in such form and contain such other information as the commissioner of taxation and finance shall require. Where a proper and complete exempt transaction certificate has been furnished and accepted by the seller in good faith, such certificate under such circumstance shall relieve the seller of the burden of proving that the Diesel motor fuel covered by such certificate is exempt from tax by reason of subparagraph (i), (iii), (iv), (v), (vi), (vii) or (ix) of paragraph (b) of subdivision three of such section two hundred eighty-two-a. Any purchaser who furnishes to his seller a false or fraudulent exempt transaction certificate for the purpose of establishing an exemption from the tax imposed by section two hundred eighty-two-a of this article shall be jointly and severally liable for the tax imposed by such section. In lieu of an exempt transaction certificate, the commissioner of taxation and finance may provide for the establishment of such exemption by means of a procedure or other document which he deems appropriate so as to secure the revenues from the excise tax on Diesel motor fuel. Provided, further, in the case of the exemption provided by subparagraph (i) of paragraph (b) of subdivision three of section two hundred eighty-two-a of this article, the commissioner shall provide for an alternative procedure or other document signed only by the seller, such as a metered delivery ticket, for the establishment of such exemption in those cases where such commissioner is satisfied that the use of such alternative procedure or other document will not jeopardize the revenues from the excise tax on Diesel motor fuel.

(b) A claim for the exemption from tax provided for in subparagraph (ii) or (viii) of paragraph (b) of subdivision

three of section two hundred eighty-two-a of this article shall be established by means of an interdistributor sale certificate. If such exemption is applicable, such certificate shall be provided by the purchaser to the seller at the time of or prior to delivery of the Diesel motor fuel. Such certificate shall set forth the name and address of the purchaser, the purchaser's registration number, an affirmation by such purchaser that the purchaser is registered as a distributor and that such Registration has not been suspended or cancelled and shall be signed by such purchaser and by the seller. Such certificate shall be in such form and contain such other information as the commissioner of taxation and finance shall require. Where a proper and complete interdistributor sale certificate has been furnished and accepted by the seller in good faith, such certificate under such circumstance shall relieve the seller of the burden of proving that the Diesel motor fuel covered by such certificate is exempt from tax by reason of subparagraph (ii) or (viii) of paragraph (b) of subdivision three of such section two hundred eighty-two-a. For purposes of this paragraph, a seller shall not have accepted such certificate in good faith if the purchaser's registration is invalid because it has been suspended or cancelled, or if the purchaser is not registered, and the commissioner of taxation and finance has furnished registered distributors with information identifying all those persons then validly registered as distributors of Diesel motor fuel and those persons whose registrations have been suspended or cancelled. Any purchaser who furnishes to his seller a false or fraudulent interdistributor sale certificate for the purpose of establishing an exemption from the tax imposed by section two hundred eighty-two-a of this article shall be jointly and severally liable for the tax imposed by such section.

4. (a) Upon each sale, other than a retail sale not in bulk, the seller must give to the purchaser and the purchaser shall receive at the time of delivery of such Diesel motor fuel, a certification containing such information as the commissioner

of taxation and finance shall require which, unless otherwise provided in this paragraph, shall include a statement to the effect: (i) if such seller is a distributor registered under this article, that he has assumed the payment of or paid the taxes imposed by this article and, in each case, is passing through such taxes; or (ii) that such seller is passing through such taxes which were so previously assumed or paid by an identified distributor registered under this article, and passed through to him. In the case of a transaction described in paragraph (a) or (b) of subdivision three of section two hundred eighty-two-a of this article which is exempt from the imposition of the taxes imposed on Diesel motor fuel or where the seller, pursuant to and in accordance with subdivision four of such section, has not passed through such taxes to the purchaser, the certificate, in lieu of either of the foregoing statements, shall state that, based upon good faith reliance on an exempt transaction certificate (or such other similar document or procedure prescribed by the commissioner of taxation and finance), an interdistributor sales certificate or the exemption document provided by an organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter, as the case may be, such motor fuel is being sold under the circumstances described in such paragraph (a) or (b) of subdivision three of section two hundred eighty-two-a or, in the case of the exemption from the pass through, is being sold under the circumstances specified in subdivision four of such section and that the taxes imposed by this article are not applicable or are not being passed through, as the case may be.

(b) In the case of a sale of Diesel motor fuel subject to the excise taxes and in all cases where the excise taxes are required to be passed through, if the certification required by this subdivision has been furnished to the purchaser at the time of delivery of such fuel and accepted in good faith, the burden of proving that the taxes imposed by this article were

assumed or paid by a distributor registered as such under this article and passed through shall be solely on the seller.

(c) Where the certification required under this subdivision is not furnished by the seller at the time of delivery of the Diesel motor fuel, it shall be presumed that the taxes imposed by this article are due and owing and have not been assumed or paid by a distributor registered as such under this article and that the purchaser in such case is jointly and severally liable for such taxes.

(d) If, due to the circumstances of delivery, it is not possible to issue a certification required under this subdivision at the time of delivery of Diesel motor fuel, the commissioner of taxation and finance may authorize the delivery of the certification required under this subdivision at a time after the delivery of the Diesel motor fuel which is the subject of the sale under the limited circumstances it shall prescribe and upon such terms and conditions it shall deem necessary to ensure collection of the taxes imposed by this article and the tax imposed by section eleven hundred three of this chapter.

APPENDIX G

NEW YORK TAX LAW

ARTICLE 20. TAX ON CIGARETTES AND TOBACCO PRODUCTS

§ 470. Definitions

When used in this article the following words shall have the meanings herein indicated:

1. "Cigarette." Any roll for smoking made wholly or in part of tobacco or of any other substance, irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco.

2. "Tobacco products." Any cigar or roll for smoking, other than a cigarette, made in whole or in part of tobacco, and any tobacco other than cigarettes, intended for consumption by smoking, chewing, or as snuff.

3. "Person" includes an individual, copartnership, limited liability company, society, association, corporation, joint stock company, and any combination of individuals and also an executor, administrator, receiver, trustee or other fiduciary.

4. "Sale" means any transfer of title or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means whatever or any agreement therefor.

5. "Retail sale" or "sale at retail" means a sale to a consumer or to any other person for any purpose other than resale.

6. "Wholesale price." The established price for which a manufacturer sells tobacco products to a distributor, before the allowance of any discount, trade allowance, rebate or other reduction.

In the absence of such an established price, a manufacturer's invoice price of any tobacco product shall be presumptive evidence of the wholesale price of such tobacco product, and in its absence the price at which such tobacco products were purchased shall be presumed to be the wholesale price, unless evidence of a lower wholesale price shall be established or any industry standard of markups relating to the purchase price in relation to the wholesale price shall be established.

7. "Dealer." Any wholesale dealer and retail dealer as hereinafter defined.

8. "Wholesale dealer." Any person who sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale, and any person who owns, operates or maintains one or more cigarette or tobacco product vending machines in, at or upon premises owned or occupied by any other person.

9. "Retail dealer." Any person other than a wholesale dealer engaged in selling cigarettes or tobacco products.

10. "Package." The individual package, box or other container in or from which retail sales of cigarettes are normally made or intended to be made.

11. "Agent." Any person licensed by the commissioner of taxation and finance to purchase and affix adhesive or meter stamps on packages of cigarettes under this article.

12. "Distributor." Any person who imports or causes to be imported into this state any tobacco product (in excess of fifty cigars or one pound of tobacco) for sale, or who manufactures any tobacco product in this state, and any person within or without the state who is authorized by the commissioner of taxation and finance to make returns and pay the tax on tobacco products sold, shipped or delivered by him to any person in the state.

13. "Unstamped or unlawfully stamped packages of cigarettes." A package of cigarettes which bears no tax stamp, or which bears a tax stamp of another state or taxing jurisdiction is considered to be an unstamped package of cigarettes. A package of cigarettes bearing a counterfeit New York state or a counterfeit joint state and New York city tax stamp is an unlawfully stamped package of cigarettes.

NEW YORK TAX LAW

ARTICLE 20. TAX ON CIGARETTES AND TOBACCO PRODUCTS

§ 471. Imposition of cigarette tax

1. There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale on and after [fig 1] March first, two thousand, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax or sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and policy statements of such an agency applicable to such sales. Such tax on cigarettes shall be at the rate of [fig 2] fifty-five and one-half cents for each ten cigarettes or fraction thereof, provided, however, that if a package of cigarettes contains more than twenty cigarettes, the rate of tax on the cigarettes in such package in excess of twenty shall be [fig 3] twenty-seven and three-quarters cents for each five cigarettes or fraction thereof. Such tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

2. It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer, and that any agent or dealer who shall pay the tax to the tax commission shall collect the tax from the purchaser or consumer. Except as hereinafter provided, the tax shall be advanced and paid by the agent. The agent shall be liable for the collection and payment of the tax on cigarettes imposed by this article and

shall pay the tax to the tax commission by purchasing, under such regulations as it shall prescribe, adhesive stamps of such designs and denominations as it shall prescribe. The tax on cigarettes may also be paid by or through the use of metering machines if the tax commission so prescribes. Agents, located within or without the state, shall purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state, in which case any dealer subsequently receiving such stamped packages of cigarettes will not be required to purchase and affix stamps on such packages of cigarettes. Notwithstanding any other provision of this article, the tax commission may by regulation provide that the tax on cigarettes imposed by this article shall be collected without the use of stamps.

3. The amount of taxes advanced and paid by the agent as hereinabove provided shall be added to and collected as part of the sales price of the cigarettes.

NEW YORK TAX LAW

ARTICLE 20. TAX ON CIGARETTES AND TOBACCO PRODUCTS

§ 471-a. Use tax on cigarettes

There is hereby imposed and shall be paid a tax on all cigarettes used in the state by any person on and after [fig 1] March first, two thousand, except that no tax shall be imposed (1) if the tax provided in section four hundred seventy-one is paid, (2) on the use of cigarettes which are exempt from the tax imposed by said section, or (3) on the use of four hundred or less cigarettes, brought into the state on, or in the possession of, any person. Such tax on cigarettes shall be at the rate of [fig 2] fifty-five and one-half cents for each ten cigarettes or fraction thereof, provided, however, that if a package of cigarettes contains more than twenty cigarettes, the rate of tax on the cigarettes in such package in excess of twenty shall be [fig 3] twenty-seven and three-quarters cents for each five cigarettes or fraction thereof. Within twenty-four hours after liability for the tax accrues, each such person shall file with the commissioner a return in such form as the commissioner may prescribe together with a remittance of the tax shown to be due thereon. For purposes of this article, the word "use" means the exercise of any right or power actual or constructive and shall include but is not limited to the receipt, storage or any keeping or retention for any length of time, but shall not include possession for sale. All other provisions of this article if not inconsistent shall apply to the administration and enforcement of the tax imposed by this section in the same manner as if the language of said provisions had been incorporated in full into this section.

NEW YORK TAX LAW

ARTICLE 20. TAX ON CIGARETTES AND TOBACCO PRODUCTS

§ 471-b. Imposition of tobacco products tax

1. There is hereby imposed and shall be paid a tax on all tobacco products possessed in this state by any person for sale, except that no tax shall be imposed on tobacco products sold under such circumstances that this state is without power to impose such tax, or sold to the United States, or sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and policy statements of such an agency applicable to such sales. Such tax on tobacco products shall be at the rate of [fig 1] twenty percent of the wholesale price, and is intended to be imposed only once upon the sale of any tobacco products. It shall be presumed that all tobacco products within the state are subject to tax until the contrary is established, and the burden of proof that any tobacco products are not taxable hereunder shall be upon the person in possession thereof.

2. The distributor shall be liable for the payment of the tax on tobacco products which he imports or causes to be imported into the state, or which he manufactures in the state, and every distributor authorized by the commissioner of taxation and finance to make returns and pay the tax on tobacco products sold, shipped or delivered by him to any person in the state shall be liable for the payment of the tax on all tobacco products so sold, shipped or delivered.

3. Every dealer shall be liable for the tax on all tobacco products in his possession at any time, upon which tax has not been paid or assumed by a distributor appointed by the commissioner of taxation and finance, and the failure of any

dealer to produce and exhibit to the commissioner of taxation and finance or his authorized representative upon demand, an invoice by a distributor or licensed wholesale dealer for any tobacco products in his possession shall be presumptive evidence that the tax thereon has not been paid, and that such dealer is liable for the tax thereon unless evidence of such invoice, payment or assumption shall later be produced.

NEW YORK TAX LAW

ARTICLE 20. TAX ON CIGARETTES AND TOBACCO PRODUCTS

§ 471-c. Use tax on tobacco products

There is hereby imposed and shall be paid a tax on all tobacco products used in the state by any person, except that no such tax shall be imposed (1) if the tax provided in section four hundred seventy-one-b of this article is paid, or (2) on the use of tobacco products which are exempt from the tax imposed by said section, or (3) on the use of two hundred fifty cigars or less or five pounds or less of tobacco brought into the state on, or in the possession of, any person. Such tax on tobacco products shall be at the rate of [fig 1] twenty percent of the wholesale price. Within twenty-four hours after liability for the tax accrues, each such person shall file with the commissioner of taxation and finance a return in such form as he may prescribe together with a remittance of the tax shown to be due thereon. For purposes of this article, the word "use" means the exercise of any right or power actual or constructive and shall include but is not limited to the receipt, storage or any keeping or retention for any length of time, but shall not include possession for sale. All the other provisions of this article, if not inconsistent, shall apply to the administration and enforcement of the tax imposed by this section in the same manner as if the language of said provisions had been incorporated in full into this section.

NEW YORK TAX LAW

ARTICLE 20. TAX ON CIGARETTES AND TOBACCO PRODUCTS

§ 471-d. Special provision as to imposition of taxes on certain tobacco products

If a person shall receive any tobacco products, upon which tobacco products this state was without power to impose the taxes under this article, and such person shall thereafter possess such tobacco products for sale or use any such tobacco products in such manner and under such circumstances as may subject the same to the taxing power of this state with respect to such possession for sale or use, such person shall be liable for the tax imposed by section four hundred seventy-one-b or four hundred seventy-one-c of this article, as the case may be with respect to such sale or use, and shall make the same reports and returns, pay the same taxes and be subject to all other provisions of this article relating to distributors, except that such a person shall not be subject to the provisions of sections four hundred seventy-two and four hundred eighty of this article if such person does not offer tobacco products for sale.

NEW YORK TAX LAW

ARTICLE 20. TAX ON CIGARETTES AND TOBACCO PRODUCTS

§ 474. Records to be Kept; Examination.

1. Every person who shall possess or transport any unstamped cigarettes upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such cigarettes. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the cigarettes transported, and the name and address of the person who has or shall assume the payment of the tax. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in cigarettes in this state and subject to the provisions of this article.

2. Every person who shall possess or transport more than two hundred fifty cigars or more than five pounds of tobacco upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such tobacco products. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products transported, and the name and address of the person who has or shall assume the payment of the tax and the wholesale price or the tax paid or payable. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in tobacco products in this state and subject to the requirements of this article.

3. Every dealer or distributor or employee thereof, or other person acting on behalf of a dealer or distributor, who shall possess or transport more than fifty cigars or more than one pound of tobacco upon the public highways, roads or

streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such tobacco products. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products transported, and the name and address of the person who has or shall assume the payment of the tax and the wholesale price or the tax paid or payable. The absence of such invoices or delivery tickets shall be prima facie evidence that the tax imposed by this article on tobacco products has not been paid and is due and owing.

4. At the time of delivering cigarettes to any person each agent or wholesale dealer, and at the time of delivering tobacco products to any person each distributor or wholesale dealer of tobacco products, shall make a true duplicate invoice showing the date of delivery, the number of packages and number of cigarettes contained therein, in each shipment of cigarettes delivered, and the items and quantity and wholesale price of each item in each shipment of tobacco products delivered, and the name of the purchaser to whom delivery is made, and shall retain the same for a period of three years subject to the use and inspection of the commissioner of taxation and finance. Each dealer shall procure and retain invoices showing the number of packages and number of cigarettes contained therein, in each shipment of cigarettes received by him, and the items and quantity and wholesale price of each item in each shipment of tobacco products received by him, the date thereof, and the name of the shipper, and shall retain the same for a period of three years subject to the use and inspection of the commissioner of taxation and finance. The commissioner of taxation and finance by regulation may provide that whenever cigarettes or tobacco products are shipped into the state, the railroad company, express company, trucking company or other public carrier transporting any shipment thereof shall file with the commissioner of taxation and finance a copy of the freight

bill within ten days after the delivery in the state of each shipment. All dealers shall maintain and keep for a period of three years such other records of cigarettes or tobacco products received, sold or delivered within the state as may be required by the commissioner of taxation and finance. The commissioner of taxation and finance is hereby authorized to examine the books, papers, invoices and other records of any person in possession, control or occupancy of any premises where cigarettes or tobacco products are placed, stored, sold or offered for sale, and the equipment of any such person pertaining to the stamping of cigarettes or the sale and delivery of cigarettes or tobacco products taxable under this article, as well as the stock of cigarettes or tobacco products in any such premises or vehicle. To verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner of taxation and finance or his duly authorized representatives, the means, facilities and opportunity for such examinations as are herein provided for and required.

NEW YORK TAX LAW

ARTICLE 20. TAX ON CIGARETTES AND TOBACCO PRODUCTS

§ 481. Penalties and Interest.

1. (a)(i)(A) An agent or distributor or other person treated as a distributor pursuant to section four hundred seventy-one-d who or which fails to file a return or to pay any tax within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten per centum of the amount of tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure continues after the expiration of the first month after such return was required to be filed or such tax became due, not exceeding thirty per centum in the aggregate.

(B) If a tax on cigarettes or on tobacco products under this article is not paid when due by any other person, the person liable for the payment of such tax shall be subject to a penalty of fifty per centum of the amount of such tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure to pay continues after the expiration of the first month after such tax became due.

(C) In the case of a failure to file such return within sixty days of the date prescribed for filing of such return by or pursuant to this article (determined with regard to any extension of time for filing), the penalty imposed by this paragraph shall not be less than the lesser of one hundred dollars or one hundred per centum of the amount required to be shown as tax on such return. For the purpose of the preceding sentence, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for

payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

(ii) If any amount of tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the underpayment rate set by the commissioner of taxation and finance pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted. Interest under this subparagraph shall not be paid if the amount thereof is less than one dollar.

(iii) If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all or part of such penalty. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause.

(iv) If the failure to pay any tax within the time required by or pursuant to this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of this paragraph, there shall be added to the tax (A) a penalty of fifty per centum of the amount of tax due, plus (B) interest on such unpaid tax at the underpayment rate set by the commissioner of taxation and finance pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter for the period beginning on the last day prescribed by this article for the payment of such tax (determined without regard to any extension of time for paying) and ending on the day on which such tax is paid, plus (C) for the period beginning on the last day prescribed by this article for the payment of such tax (determined without regard to any extension of time for paying) and ending on the day the amount of tax due is finally determined or, if earlier, on the day on which such tax is paid, an amount equal to fifty per centum of the interest payable under clause (B) of this

subparagraph on that portion of the unpaid tax which is attributable to fraud.

(v) The penalties and interest provided for in this paragraph shall be determined, assessed, collected and paid in the same manner as the taxes imposed by this article and shall be disposed of as hereinafter provided with respect to moneys derived from the tax. Interest under this paragraph shall be compounded daily.

(b)(i) In addition to any other penalty imposed by this article, the commissioner may impose a penalty of not more than one hundred fifty dollars for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. In addition, the commissioner may impose a penalty of not more than seventy-five dollars for each fifty cigars or one pound of tobacco, or fraction thereof, in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under the control of any person and a penalty of not more than one hundred fifty dollars for each fifty cigars or pound of tobacco, or fraction thereof, in excess of five hundred cigars or ten pounds of tobacco in the possession or under the control of any person, with respect to which the tobacco products tax has not been paid or assumed by a distributor or tobacco products dealer; provided, however, that any such penalty imposed shall not exceed seven thousand five hundred dollars in the aggregate. The commissioner may impose a penalty of not more than seventy-five dollars for each fifty cigars or one pound of tobacco, or fraction thereof, in excess of fifty cigars or one pound of tobacco in the possession or under the control of any tobacco products dealer or distributor appointed by the commissioner, and a penalty of not more than one hundred fifty dollars for each fifty cigars or pound of tobacco, or fraction thereof, in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under

the control of any such dealer or distributor, with respect to which the tobacco products tax has not been paid or assumed by a distributor or a tobacco products dealer; provided, however, that any such penalty imposed shall not exceed fifteen thousand dollars in the aggregate.

(ii) The penalties imposed by this subparagraph may be imposed by the commissioner in addition to any other penalty imposed by this article, but in lieu of the penalties imposed by subparagraph (i) of this paragraph:

(A)(I) not less than thirty dollars but not more than two hundred dollars for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes but less than or equal to five thousand cigarettes in unstamped or unlawfully stamped packages knowingly in the possession or knowingly under the control of any person;

(II) not less than seventy-five dollars but not more than two hundred dollars for each two hundred cigarettes, or fraction thereof, in excess of five thousand cigarettes but less than or equal to twenty thousand cigarettes in unstamped or unlawfully stamped packages knowingly in the possession or knowingly under the control of any person; and

(III) not less than one hundred dollars but not more than two hundred dollars for each two hundred cigarettes, or fraction thereof, in excess of twenty thousand cigarettes in unstamped or unlawfully stamped packages, knowingly in the possession or knowingly under the control of any person.

(B)(I) not less than twenty-five dollars but not more than one hundred dollars for each fifty cigars or one pound of tobacco, or fraction thereof, in excess of two hundred fifty cigars or five pounds of tobacco knowingly in the possession or knowingly under the control of any person, with respect to which the tobacco products tax has not been paid or assumed by a distributor or tobacco products dealer; and

(II) not less than fifty dollars but not more than two hundred dollars for each fifty cigars or pound of tobacco, or fraction thereof, in excess of five hundred cigars or ten pounds of tobacco knowingly in the possession or knowingly under the control of any person, with respect to which the tobacco products tax has not been paid or assumed by a distributor or tobacco products dealer; provided, however, that any such penalty imposed under this clause shall not exceed ten thousand dollars in the aggregate.

(C)(I) not less than twenty-five dollars but not more than one hundred dollars for each fifty cigars or one pound of tobacco, or fraction thereof, in excess of fifty cigars or one pound of tobacco knowingly in the possession or knowingly under the control of any person, with respect to which the tobacco products tax has not been paid or assumed by a distributor or tobacco products dealer; and

(II) not less than fifty dollars but not more than two hundred dollars for each fifty cigars or pound of tobacco, or fraction thereof, in excess of two hundred fifty cigars or five pounds of tobacco knowingly in the possession or knowingly under the control of any person, with respect to which the tobacco products tax has not been paid or assumed by a distributor or a tobacco products dealer; provided, however, that any such penalty imposed under this clause shall not exceed twenty thousand dollars in the aggregate.

(iii) Any penalty provided for in this paragraph shall be determined as provided in section four hundred seventy-eight of this chapter, and may be reviewed only pursuant to such section. Such penalty shall be collected in the same manner as the taxes imposed by this article. The commissioner in the commissioner's discretion, may remit all or part of such penalty. Such penalty shall be paid to the department and disposed of as hereinafter provided with respect to moneys derived from the tax.

2. (a) The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages or more than two hundred fifty cigars or more than five pounds of tobacco by any person other than an agent or distributor, as the case may be, at any one time shall be presumptive evidence that such cigarettes or tobacco products are subject to tax as provided by this article.

(b) Nothing in this section shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing tobacco products or unstamped packages of cigarettes as merchandise, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of tobacco products or unstamped or unlawfully stamped packages of cigarettes, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose possession is for the purpose of aiding police officers in performing their duties.

3. For purposes of this chapter, the certificate of the commissioner of taxation and finance to the effect that a tax or fee imposed by this article has not been paid, that a return required by or under the provisions of this article has not been filed, or that information has not been supplied, as required by or under the provisions of this article, or that a bond or other security required by or pursuant to the provisions of this article has not been filed, or that books, accounts, records, memoranda, documents or papers have not been supplied as required by or pursuant to the authority of this article, or that a retail dealer or vending machine owner or operator is not currently or validly registered as required by this article shall be prima facie evidence that such tax or fee has not been paid, such return not filed, such information not supplied, such bond or other security not filed, that such books, accounts,

records, memoranda, documents or papers have not been supplied, or that such retail dealer or vending machine owner or operator is not currently or validly registered.

4. Cross-reference: For criminal penalties, see article thirty-seven of this chapter.

APPENDIX H

NEW YORK TAX LAW

ARTICLE 28. SALES AND COMPENSATING USE TAXES

§ 1101. Definitions [Excerpts]

. . .

(4) Retail sale.

(iii) (Added, L 1995) Notwithstanding the provisions of subparagraph (i) of this paragraph, no cigarettes shall be sold or used in this state without payment, and inclusion in the sales price of such cigarettes, of the tax on cigarettes required to be prepaid pursuant to the provisions of section eleven hundred three of this article except where a provision of this article relating to cigarettes specifically provides otherwise and except in the case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by section eleven hundred three of this article, the provisions of this subparagraph shall not otherwise modify the meaning of the term "retail sale" as used in this article. For purposes of this subparagraph and sections eleven hundred three, eleven hundred eleven, eleven hundred fifteen, eleven hundred sixteen, eleven hundred twenty-one, eleven hundred thirty-two, eleven hundred thirty-four, eleven hundred thirty-five, eleven hundred thirty-six, eleven hundred thirty-eight, eleven hundred forty-two and eleven hundred forty-five of this article and eighteen hundred seventeen of this chapter, the terms "cigarette," "agent" and "package" shall have the same meaning that they have for purposes of article twenty of this chapter.

. . .

NEW YORK TAX LAW

ARTICLE 28. SALES AND COMPENSATING USE TAXES

§ 1102. Prepayment of sales tax on motor fuel and diesel motor fuel

(a)(1) Every distributor of motor fuel shall pay, as a prepayment on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, a tax on each gallon of motor fuel (i) which he imports or causes to be imported into this state for use, distribution, storage or sale in the state or produces, refines, manufactures or compounds in this state or (ii) if the tax has not been imposed prior to its sale in this state, which he sells (which acts shall in regard to motor fuel hereinafter in this article be encompassed by the phrase "imported, manufactured or sold"), except when imported, manufactured or sold under circumstances which preclude the collection of such tax by reason of the United States constitution and of the laws of the United States enacted pursuant thereto or when imported or manufactured by an organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this article or a hospital included in the organizations described in paragraph four of such subdivision for its own use and consumption and except kero-jet fuel when imported by an airline for use in its airplanes.

(2) Every distributor of diesel motor fuel shall pay, as a prepayment on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, a tax upon the sale or use of diesel motor fuel in this state. The tax shall be computed based upon the number of gallons of diesel motor fuel sold or used. Provided, however, if the tax has not been imposed prior thereto, it shall be imposed on the delivery of diesel motor fuel to a retail service station. The collection of such tax shall not be made

applicable to the sale or use of diesel motor fuel under circumstances which preclude the collection of such tax by reason of the United States constitution and of laws of the United States enacted pursuant thereto. The prepaid tax on diesel motor fuel shall not apply to the sale of previously untaxed diesel motor fuel which is not enhanced Diesel motor fuel to a person registered as a distributor of Diesel motor fuel other than a sale to such person which involves a delivery at a filling station or into a repository which is equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle or the sale to or delivery at a filling station or other retail vendor of water-white kerosene provided such filling station or other retail vendor only sells such water-white kerosene exclusively for heating purposes in containers of no more than twenty gallons.

(3) The amount of such prepayment per gallon shall be computed pursuant to the provisions of subdivision (e) of section eleven hundred eleven of this article. Provided, further, no motor fuel or diesel motor fuel shall be included in the measure of the tax under clause (i) of paragraph one and paragraph two of this subdivision unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution.

(b) The taxes required to be prepaid pursuant to this section shall be administered and collected in a like manner as the taxes imposed by sections eleven hundred five and eleven hundred ten of this article. All the provisions of this article relating to or applicable to the administration, collection and disposition of the taxes imposed by such sections shall apply to the tax required to be prepaid under this section so far as such provisions can be made applicable to such prepayments of tax with such limitations as set forth in this article and such modifications as may be necessary in order to adapt such language to the tax so imposed, provided,

however, that the provisions of paragraph one of subdivision (c) of section eleven hundred thirty-seven of this article and the reference in section eleven hundred thirty-seven-A of this article to such paragraph one of subdivision (c) of section eleven hundred thirty-seven shall not be applicable to such tax required to be prepaid under this section. Such provisions shall apply with the same force and effect as if the language of those provisions had been set forth in full in this section except to the extent that any provision is either inconsistent with a provision of this section or is not relevant to the tax required to be prepaid by this section. For purposes of this section, any reference in this article to the tax or taxes imposed by this article shall be deemed to refer to the tax required to be prepaid pursuant to this section unless a different meaning is clearly required. Provided, further, that, except as otherwise provided in subdivision (j) of section eleven hundred fifteen of this article and except as otherwise provided in paragraph five of subdivision (b) of section eleven hundred sixteen of this article, the exemptions provided in such sections (other than that provided in paragraph nine of subdivision (a) of such section eleven hundred fifteen with respect to purchases of kero-jet fuel) shall not apply to the tax required to be prepaid under this section.

(c) Nothing in this article shall be construed to require the payment of the tax required to be prepaid pursuant to this section more than once upon motor fuel or diesel motor fuel sold within the state. When the foregoing prepaid tax imposed pursuant to this section is paid it shall have been so paid on account of the taxes imposed by this article or pursuant to the authority of article twenty-nine of this chapter with respect to the retail sale or use of motor fuel or diesel motor fuel. Nothing in this section shall modify or affect the taxes imposed by sections eleven hundred five and eleven hundred ten of this article as applied to receipts from the sale or use of such fuel.

(d) Deposit and disposition of revenue.

(1) Consistent with sections eleven hundred forty-eight and twelve hundred sixty-one of this chapter, the taxes imposed pursuant to this section and interest and penalties thereon received by the commissioner, after deducting the amount which the commissioner of taxation and finance or his delegate shall determine to be necessary for reasonable costs of the commissioner in administering, collecting and distributing such taxes, shall be deposited daily with such responsible banks, banking houses or trust companies, as may be designated by the comptroller, to the credit of the comptroller. Of the total revenue collected or received under this section, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds under this article and pursuant to the authority of article twenty-nine of this chapter.

(2) On or before the twelfth day of each month, after reserving such amount for such refunds and such costs, the commissioner of taxation and finance or his delegate shall certify to the comptroller the amount of all revenues so received during the prior month as a result of the taxes, interest and penalties so imposed and, in addition, on or before the last day of June and December the commissioner or delegate shall certify the amount of such moneys received during and including the first twenty-five days of said months. At the time he prepares such certification, the commissioner of taxation and finance or his delegate shall determine the receipts attributable to the amount of motor fuel and diesel motor fuel sold at retail in each county and city and in the metropolitan commuter transportation district subject to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article and the like taxes imposed pursuant to the authority of article twenty-nine of this chapter and he shall certify the portion of such receipts

from the total payments that represents the prepaid tax on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter (determined without regard to the taxes imposed by this section and any like taxes imposed pursuant to the authority of article twenty-nine of this chapter) based upon the retail sales or uses of such fuel in such jurisdiction or district. The amount of revenues so certified shall be deposited and distributed by the comptroller in accordance therewith. Where the amount so certified in any distribution is more or less than the amount due, the amount of the overpayment or underpayment shall be determined as soon after the discovery of the overpayment or underpayment as is reasonably possible and subsequent certifications to the comptroller shall be adjusted by subtracting the amount of any such overpayment from or by adding the amount of any such underpayment to such number of subsequent payments as the comptroller and the commissioner of taxation and finance shall consider reasonable in view of the amount of the overpayment or underpayment and all other pertinent facts and circumstances.

(e) For the purposes of this section and article twelve-A of this chapter the term "use" shall mean, in addition to the meaning set forth in paragraph seven of subdivision (b) of section eleven hundred one of this article, the exercise of any right or power over motor fuel or diesel motor fuel by any person, whether or not a purchaser, including, but not limited to, the receiving, the withdrawal from storage or any consumption of such fuel.

NEW YORK TAX LAW

ARTICLE 28. SALES AND COMPENSATING USE TAXES

§ 1103. Prepayment of sales tax on cigarettes

(a)(1) Every cigarette agent shall pay, as a prepayment on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, a tax on cigarettes possessed for sale or use in this state and to which an agent is required to affix cigarette tax stamps under article twenty of this chapter, at the time that the agent is required to purchase and affix such stamps (or as otherwise prescribed by the commissioner pursuant to such article twenty) and the provisions of such article twenty in relation to the use of stamps to evidence payment of the tax imposed by such article twenty shall be applicable to the prepayment imposed by this section, except no tax shall be required to be prepaid on cigarettes sold under circumstances that this state is without power to impose such prepayment or sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and written policy statements of such an agency applicable to such sales.

(2) The tax imposed by this section shall be paid at the same time and in the same manner as the tax imposed by such article twenty with respect to cigarettes. The commissioner may, in the commissioner's discretion, permit an agent to pay the tax imposed under this section at the same time that the agent pays for cigarette tax stamps under article twenty of this chapter and may require any such agent to file with the department a bond issued by a surety company approved by the superintendent of insurance as to solvency and

responsibility and authorized to transact business in the state or other security acceptable to the commissioner, in such amount as the commissioner may fix, to secure the payment of any sums due from such agent pursuant to this section. If securities are deposited as security under this subdivision, such securities shall be kept in the custody of the commissioner and may be sold by the commissioner if it becomes necessary to do so in order to recover any sums due from such agent pursuant to this section, but no such sale shall be had until after such agent shall have had an opportunity to litigate the validity of any prepayment of tax if it elects to do so. Upon any such sale, the surplus, if any, above the sums due under this section shall be returned to such agent. Any bond or security required under this section may be jointly administered with the bond or security required of the agent under section four hundred seventy-two of this chapter and in such event shall secure payment of the sums due under such article twenty and under this section. The tax imposed by this section and the portion of the cost of any stamp which evidences payment of the tax imposed by this section and which is attributable to the tax imposed by this section shall not be included in the term "basic cost of cigarettes" as such term is defined in section four hundred eighty-three of this chapter.

(3) Every person other than an agent shall prepay the tax imposed by this section at the same time and in the same manner as the use tax imposed by section four hundred seventy-one-a of this chapter. The commissioner may require any compensating use tax imposed by section eleven hundred ten and pursuant to the authority of article twenty-nine of this chapter to be paid at such time after allowing for the credit provided by subdivision (b) of section eleven hundred twenty-one of this article.

(4) The amount of the prepayment for cigarettes imposed by this section shall be computed pursuant to the

provisions of subdivision (j) of section eleven hundred eleven of this article.

(b) Except as otherwise provided in this section, the taxes required to be prepaid pursuant to this section shall be administered and collected in a like manner as the taxes imposed by sections eleven hundred five and eleven hundred ten of this article. All the provisions of this article relating to or applicable to the administration, collection and disposition of the taxes imposed by such sections shall apply to the tax required to be prepaid under this section so far as such provisions can be made applicable to such prepayments of tax with such limitations as set forth in this article and such modifications as may be necessary in order to adapt such language to the tax so imposed; provided, however, that the provisions of paragraph one of subdivision (c) of section eleven hundred thirty-seven of this article shall not be applicable to such tax required to be prepaid under this section. Such provisions shall apply with the same force and effect as if the language of those provisions had been set forth in full in this section except to the extent that any provision is either inconsistent with a provision of this section or is not relevant to the tax required to be prepaid by this section. For purposes of this section, any reference in this article to the tax or taxes imposed by this article shall be deemed to refer to the tax required to be prepaid pursuant to this section unless a different meaning is clearly required.

(c) Nothing in this article shall be construed to require the payment of the tax required to be prepaid pursuant to this section more than once upon cigarettes possessed for sale or used within the state. When the prepaid tax imposed pursuant to this section is paid, it shall have been so paid on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter with respect to the retail sale or the use of cigarettes. Nothing in this section shall modify or affect the taxes imposed by

sections eleven hundred five and eleven hundred ten of this article as applied to receipts from the sale, or to the use, of such cigarettes.

(d) Deposit and disposition of revenue.

(1) Consistent with sections eleven hundred forty-eight of this article and twelve hundred sixty-one of this chapter, the taxes required to be prepaid pursuant to this section and interest and penalties thereon received by the commissioner, after deducting the amount which the commissioner shall determine to be necessary for reasonable costs of the commissioner in administering, collecting, and distributing such taxes, shall be deposited daily with such responsible banks, banking houses or trust companies, as may be designated by the comptroller, to the credit of the comptroller. Of the total revenue collected or received under this section, the comptroller shall retain in the comptroller's hands such amount as the commissioner may determine to be necessary for refunds under this article and pursuant to the authority of article twenty-nine of this chapter.

(2) On or before the twelfth day of each month, after reserving such amount for such refunds and such costs, the commissioner shall determine the amount of all revenues so received during the prior month as a result of the taxes, interest and penalties so imposed and, in addition, on or before the last day of June and December the commissioner shall determine in like manner the amount of such moneys received during and including the first twenty-five days of said months. The commissioner shall determine the proportion of revenues attributable to receipts for the period for which the determination is made pursuant to the preceding sentence from taxes on sales and uses of property and services and rent and amusement charges imposed by this article and pursuant to the authority of article twenty-nine of this chapter and administered by the commissioner which is payable to each jurisdiction determined without regard to this

section. The amount of revenues so determined pursuant to this section shall be deposited and distributed by the comptroller in accordance with the same percentage amount to which a jurisdiction is entitled determined without regard to this section. Where the amount so determined in any distribution from such taxes (other than the tax imposed by this section) is more or less than the amount due, the amount of the overpayment or underpayment shall be determined as soon after the discovery of the overpayment or underpayment as is reasonably possible and subsequent determinations shall be adjusted by subtracting the amount of any such overpayment from or by adding the amount of any such underpayment to such number of subsequent payments as the comptroller and the commissioner shall consider reasonable in view of the amount of the overpayment or underpayment and all other pertinent facts and circumstances. The commissioner shall not be liable for any overestimate or underestimate of the amount of the distribution. Nor shall the commissioner be liable for any inaccuracy in any determination with respect to the amount of the distribution or any required adjustment with respect to the distribution, but the commissioner shall as soon as practicable after discovery of any error adjust the next determination under this section to reflect any such error.

NEW YORK TAX LAW

ARTICLE 28. SALES AND COMPENSATING USE TAXES

§ 1116. Exempt organizations [Excerpts]

(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

. . .

(6) The following Indian nations or tribes residing in New York state: Cayuga, Oneida, Onondaga, Poospatuck, Saint Regis Mohawk, Seneca, Shinnecock, Tonawanda and Tuscarora, where it is the purchaser, user or consumer.

(b) Nothing in this section shall exempt:

. . .

(5) purchases of motor fuel or diesel motor fuel from the tax required to be prepaid pursuant to section eleven hundred two of this article and retail sales of motor fuel or diesel motor fuel subject to the tax imposed by sections eleven hundred five and eleven hundred ten of this article, except that purchases of such fuel by an organization described in paragraph one or two of subdivision (a) of this section for its own use or consumption, purchases of motor fuel by a hospital included in the organizations described in paragraph four of such subdivision for its own use and consumption, purchases of motor fuel and diesel motor fuel by a fire company or fire department, as defined in section three of the volunteer firefighters' benefit law or a voluntary ambulance service, as defined in section three thousand one of the public health law, for such department,

company or service's own use and consumption for use in firefighting vehicles, apparatus or equipment, or emergency rescue or first aid response vehicles, apparatus or equipment, owned and operated by such department, company or service if such company, department or service qualifies as an exempt organization pursuant to the provisions of paragraph four of subdivision (a) of this section and purchases of diesel motor fuel by an organization described in paragraph four of such subdivision for its own heating use and consumption shall be exempt from such tax required to be prepaid and from retail sales and use taxes on such fuel.

(6) (Added, L 1995) purchases of cigarettes from the tax required to be prepaid pursuant to section eleven hundred three of this article, except that no prepayment of tax shall be required on sales of cigarettes sold under such circumstances that this state is without power to impose such tax or sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and written policy statements of such agency applicable to such sales.

. . .

APPENDIX I

NEW YORK TAX LAW

ARTICLE 37. CRIMES AND OTHER OFFENSES, SEIZURES AND FORFEITURES
PART III—OTHER TAXES

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§ 1814. Cigarettes and Tobacco Products Tax.

(a) Attempt to evade or defeat tax.—

(1) Any person who willfully attempts in any manner to evade or defeat any tax imposed by article twenty of this chapter or the payment thereof shall, in addition to other penalties provided by law, be guilty of a misdemeanor.

(2) Any person who willfully attempts in any manner to evade or defeat the taxes imposed by article twenty of this chapter or payment thereof on (i) twenty thousand cigarettes or more (ii) twenty-two thousand cigars or more, or (iii) four hundred forty pounds of tobacco or more or has previously been convicted two or more times of a violation of paragraph one of this subdivision shall be guilty of a class E felony.

(b) Willful failure to file a return or report, or pay tax.—Any person required under article twenty of this chapter to pay or make a return or report, who willfully fails to pay such tax or make such return or report, at the time or times so required, shall be guilty of a misdemeanor.

(c) Fraudulent returns, reports, statements or other documents.—(1) Any person who willfully makes and subscribes any return, report, statement or other document which is required to be filed with or furnished to the commissioner of taxation and finance or to any person, pursuant to article twenty of this chapter, which he does not believe to be true and correct as to every material matter shall be guilty of a misdemeanor.

(2) Any person who willfully delivers or discloses to the commissioner of taxation and finance or to any person, pursuant to article twenty of this chapter, any list, return, report, account, statement or other document known by him to be fraudulent or to be false as to any material matter shall be guilty of a misdemeanor.

(3) For purposes of this section, the omission by any person of any material matter with intent to deceive shall constitute the delivery or disclosure of a document known by him to be fraudulent or to be false as to any material matter.

(d) Any person, other than an agent licensed by the commissioner, who possesses or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax imposed by section four hundred seventy-one of this chapter, or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes in violation of the provisions of article twenty of this chapter shall be guilty of a misdemeanor. Any person who violates the provisions of this subdivision after having previously been convicted of a violation of this subdivision within the preceding five years shall be guilty of a class E felony.

(e)(1) Any person, other than an agent licensed by the commissioner, who willfully possesses or transports for the purpose of sale twenty thousand or more cigarettes subject to the tax imposed by section four hundred seventy-one of this chapter in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale twenty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of article twenty of this chapter shall be guilty of a class E felony.

(2) Any person, other than an agent licensed by the commissioner, who willfully possesses or transports for the purpose of sale thirty thousand or more cigarettes subject to the tax imposed by section four hundred seventy-one of this

chapter in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale thirty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of article twenty of this chapter shall be guilty of a class D felony.

(f) For the purposes of this section, the possession or transportation within this state by any person, other than an agent, at any one time of five thousand or more cigarettes in unstamped or unlawfully stamped packages shall be presumptive evidence that such cigarettes are possessed or transported for the purpose of sale and are subject to the tax imposed by section four hundred seventy-one of this chapter. With respect to such possession or transportation any provisions of article twenty of this chapter providing for a time period during which a use tax imposed by such article may be paid on unstamped cigarettes or unlawfully or improperly stamped cigarettes or during which such cigarettes may be returned to an agent shall not apply. The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages by any person other than an agent at any one time shall be presumptive evidence that such cigarettes are subject to tax as provided by article twenty of this chapter.

(g) Nothing in this section shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing unstamped packages of cigarettes as merchandise, or lawfully transporting or storing tobacco products, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of unstamped or unlawfully stamped packages of cigarettes or possession or control of tobacco products, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose

possession is for the purpose of aiding police officers in performing their duties.

(h) Any willful act or omission, other than those described in subdivision (a), (b), (c), (d), (e), (f), (g), (i) or (j) of this section, by any person which constitutes a violation of any provision of article twenty of this chapter shall constitute a misdemeanor.

(i) Any person who falsely or fraudulently makes, alters or counterfeits any stamp prescribed by the tax commission under the provisions of article twenty of this chapter, or causes or procures to be falsely or fraudulently made, altered or counterfeited any such stamp, or knowingly and willfully utters, purchases, passes or tenders as true any such false, altered or counterfeited stamp, or knowingly and willfully possesses any cigarettes in packages bearing any such false, altered or counterfeited stamp, and any person who knowingly and willfully makes, causes to be made, purchases or receives any device for forging or counterfeiting any stamp, prescribed by the tax commission under the provisions of article twenty of this chapter, or who knowingly and willfully possesses any such device, shall be guilty of a class E felony. For the purposes of this subdivision, the words "stamp prescribed by the tax commission" shall include a stamp, impression or imprint made by a metering machine, the design of which has been approved by such commission.

(j)(1) Any dealer, other than a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control more than ten pounds of tobacco or more than five hundred cigars upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter, shall be

guilty of a misdemeanor punishable by a fine of not more than five thousand dollars or by a term of imprisonment not to exceed thirty days.

(2) Any person, other than a dealer or a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control more than fifteen pounds of tobacco or more than seven hundred fifty cigars upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter shall be guilty of a misdemeanor punishable by a fine of not more than five thousand dollars or by a term of imprisonment not to exceed thirty days.

(3) Any person, other than a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control twenty-five hundred or more cigars or fifty or more pounds of tobacco upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter shall be guilty of a misdemeanor. Provided further, that any person who has twice been convicted under this subdivision shall be guilty of a class E felony for any subsequent violation of this section, regardless of the amount of tobacco products involved in such violation.

(4) For purposes of this subdivision, such person shall knowingly transport or have in his custody, possession or under his control tobacco or cigars on which such taxes have not been assumed or paid by a distributor appointed by the

commissioner of taxation and finance where such person has knowledge of the requirement of the tax on tobacco products and, where to his knowledge, such taxes have not been assumed or paid on such tobacco products by a distributor appointed by the commissioner of taxation and finance.

(k) Any person who falsely or fraudulently makes, alters or counterfeits a registration certificate or sticker required under the provisions of section four hundred eighty-a of this chapter, or causes or procures to be falsely or fraudulently made, altered or counterfeited any such registration certificate or sticker, or knowingly and willfully utters, purchases, passes or tenders as true any such false, altered or counterfeited registration certificate or sticker, and any person who knowingly and willfully makes, causes to be made, purchases or receives any device for forging or counterfeiting any registration certificate or sticker required under the provisions of such section, or who knowingly and willfully possesses any such device, shall be guilty of a class B misdemeanor.

NEW YORK TAX LAW

ARTICLE 37. CRIMES AND OTHER OFFENSES, SEIZURES AND FORFEITURES
PART III—OTHER TAXES

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§ 1846. Seizure and Forfeiture of Cigarettes.

(a) Whenever a police officer designated in section 1.20 of the criminal procedure law or a peace officer designated in subdivision four of section 2.10 of such law, acting pursuant to his special duties, shall discover any cigarettes subject to tax provided by article twenty of this chapter, and upon which the tax has not been paid or the stamps not affixed as required by such article, they are hereby authorized and empowered forthwith to seize and take possession of such cigarettes, together with any vending machine or receptacle in which they are held for sale. Such cigarettes, vending machine or receptacle seized by a police officer or such peace officer shall be turned over to the tax commission. Such seized cigarettes, vending machine or receptacle, not including money contained in such vending machine or receptacle, shall be forfeited to the state. The tax commission may, within a reasonable time thereafter, upon publication of a notice to such effect for at least five successive days, before the day of sale, in a newspaper published or circulated in the county where the seizure was made, sell such forfeited cigarettes and vending machines or receptacles at public sale and pay the proceeds into the state treasury to the credit of the general fund. Cigarettes so seized and sold shall be sold only to an agent under article twenty of this chapter and the notice of sale shall contain a provision to this effect. Notwithstanding any other provision of this section, the tax commission may enter into an agreement with any city of this state which is authorized to impose a tax similar to that imposed by article twenty of this chapter to provide for the disposition between the state and any such city of the proceeds from any such sale.

(b) In the alternative, the tax commission, on reasonable notice by mail or otherwise, may permit the person from whom said cigarettes were seized to redeem the said cigarettes, and any vending machine or receptacle seized therewith, by the payment of the tax due, plus a penalty of fifty per centum thereof, plus interest on the amount of tax due for each month or fraction thereof after such tax became due (determined without regard to any extension of time for filing or paying) at the rate applicable under subparagraph (ii) of paragraph (a) of subdivision one of section four hundred eighty-one of this chapter and the costs incurred in such proceeding, which total payment shall not be less than five dollars; provided, however, that such seizure and sale or redemption shall not be deemed to relieve any person from fine or imprisonment provided for in this article for violation of any provision of article twenty of this chapter.

(c) In the alternative, if the tax commission concludes that any cigarettes seized pursuant to this section, when offered at public sale, will bring a price less than the reasonably estimated price which the department of correctional services would have to pay for the purchase of such cigarettes for sale to or use by inmates in institutions under the jurisdiction of such department, the tax commission may dispose of such cigarettes by transferring them to the department of correctional services for sale to or use by inmates in such institutions.

(d) Cigarettes seized pursuant to a violation of section four hundred seventy- three-b of this chapter shall be destroyed or sold for export at the discretion of the commissioner. The department may also seize and destroy any vending machine or receptacle in which cigarettes stamped in violation of section four hundred seventy-three-b of this chapter are held for sale.

NEW YORK TAX LAW

ARTICLE 37. CRIMES AND OTHER OFFENSES, SEIZURES AND FORFEITURES
PART III—OTHER TAXES

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§ 1847. Seizure and Forfeiture of Vehicles or Other Means of Transportation Used to Transport or for Deposit or Concealment of Cigarettes or Used to Import Tobacco Products.

(a) Any peace officer designated in subdivision four of section 2.10 of the criminal procedure law, acting pursuant to his special duties, or any police officer designated in section 1.20 of the criminal procedure law may seize any vehicle or other means of transportation used to transport or for the deposit or concealment of more than one hundred unstamped or unlawfully stamped packages of cigarettes subject to tax under article twenty of this chapter, other than a vehicle or other means of transportation used by any person as a common carrier in transaction of business as such common carrier, and such vehicle or other means of transportation shall be subject to forfeiture as hereinafter in this section provided.

(b) Any peace officer designated in subdivision four of section 2.10 of the criminal procedure law, acting pursuant to his special duties, or any police officer designated in section 1.20 of the criminal procedure law may seize any vehicle or other means of transportation used to import tobacco products in excess of five hundred cigars or ten pounds of tobacco for sale where the person importing or causing such tobacco products to be imported has not been appointed a distributor pursuant to section four hundred seventy-two of this chapter, other than a vehicle or other means of transportation used by any person as a common carrier in transaction of business as such common carrier, and such vehicle or other means of

transportation shall be subject to forfeiture as hereinafter in this section provided.

(c) The seized property shall be delivered by the officer having made the seizure to the custody of the district attorney of the county wherein the seizure was made, except that in the city of New York, Yonkers or Buffalo, the seized property shall be delivered to the custody of the police department of such city, together with a report of all the facts and circumstances of the seizure.

(d) It shall be the duty of the district attorney of the county wherein the seizure was made, if elsewhere than in the city of New York, Yonkers or Buffalo, and where the seizure is made in any of such cities it shall be the duty of the corporation counsel of the city, to inquire into the facts of the seizure so reported to him and if it appears probable that a forfeiture has been incurred, for the determination of which the institution of proceedings in the supreme court is necessary, to cause the proper proceedings to be commenced and prosecuted, at any time after thirty days from the date of seizure, to declare such forfeiture, unless, upon inquiry and examination such district attorney or corporation counsel decides that such proceedings cannot probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case, the district attorney or corporation counsel shall cause such seized property to be returned to the owner thereof.

(e) Notice of the institution of the forfeiture proceeding shall be served either (i) personally on the owners of the seized property or (ii) by registered mail to the owners' last known address and by publication of the notice once a week for two successive weeks in a newspaper published or circulated in the county wherein the seizure was made.

(f) Forfeiture shall not be adjudged where the owners establish by a preponderance of the evidence that (i) the use

of such seized property was not intentional on the part of any owner, (ii) said seized property was used by any person other than an owner thereof, while such seized property was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any state, or (iii) forfeiture is not warranted or would not serve the ends of justice, taking into consideration the factors specified in paragraph (d) of subdivision four of section thirteen hundred eleven of the civil practice law and rules.

(g) The district attorney or the police department having custody of the seized property, after such judicial determination of forfeiture, shall, at its discretion, either retain such seized property for the official use of its office or department, transfer such property to the department of taxation and finance of the state of New York for its official use, or, upon publication of a notice to such effect for at least five successive days, before the day of sale, in a newspaper published or circulated in the county where the seizure was made, sell such forfeited property at public sale. The net proceeds of any such sale, after deduction of the lawful expenses incurred, shall be paid into the general fund of the county wherein the seizure was made except that the net proceeds of the sale of property seized in the city of New York, Yonkers or Buffalo shall be paid into the general fund of such city.

(h) Whenever any property is seized and declared forfeited, any person interested in any such property may apply to a justice of the supreme court, on serving a notice of petition and petition on the appropriate district attorney, police department or corporation counsel, for the recovery of such forfeited property. The justice of the supreme court to whom such application is made may restore said forfeited property upon such terms as he deems reasonable and just, if the petitioner establishes either of the affirmative defenses set

forth in subdivision (f) of this section and that the petitioner was without personal or actual knowledge of the forfeiture proceeding. If the petition is filed after the sale of the forfeited property, any judgment in favor of the petitioner shall be limited to the net proceeds of such sale, after deduction of the lawful expenses and costs incurred by the district attorney, police department or corporation counsel.

(i) No suit or action under this section for wrongful seizure shall be instituted unless such suit or action is commenced within two years after the time when the property was seized.

APPENDIX J

STATE OF NEW YORK
DEPARTMENT OF TAXATION
AND FINANCE COMMISSIONER OF
TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171, section 289-f (not subdivided), section. 475 (not subdivided), and section 1142, subdivisions (1), (11) and (12), of the Tax Law, the Commissioner of Taxation and Finance, at an open meeting held on even date with the signing of this rule, hereby makes and adopts as a permanent rule the following amendments to the regulations with respect to the Cigarette Tax, the Motor Fuel Tax, the Diesel Motor Fuel Tax and the Sales and Use Taxes, as published in Article 1 of Subchapter C, in Articles 1 and 2 of Subchapter F, and in Subchapter J, respectively, of Chapter III of Title 20 of the Official Compilation of the Codes, Rules and Regulations of the State of New York.

Section 1. Subdivision (b) of section 336.1 of such regulations is amended to read as follows:

(b)(1) In general, exemptions from the cigarette tax shall be effectuated by means of a licensed cigarette agent's sale of cigarettes upon which such tax has not been prepaid by the seller on behalf of the ultimate consumer nor precollected as part of the selling price of such cigarettes. Cigarettes upon which the tax has not-been prepaid and precollected shall include unstamped packages of cigarettes, as will as specially stamped exempt packages if so authorized by the Commissioner of Taxation and Finance. Cigarettes upon which the tax has been paid shall, only in extraordinary circumstances or as specifically provided for in Part 337 of this Title, be sold for exempt purposes. Where the seller of such cigarettes or an exempt purchaser can establish to the satisfaction of the

Department of Taxation and Finance that circumstances necessitated the sale or purchase of cigarettes upon which the tax had been paid and that such tax was borne by the seller or exempt purchaser, as the case may be, the department may refund the tax paid. (However, in no event may a seller of cigarettes bring cigarettes onto a qualified Indian reservation for purposes of making qualified sales other than as provided in sections 336.6 and 336.7 of this Part.] No interest shall be paid by the department on any such refunds.

(2) Except as provided herein, only a licensed cigarette agent may sell cigarettes upon which the tax has not been prepaid and precollected. Exceptions to this rule are limited to sales by:

(i) persons introducing cigarettes into the New York State market for sale exclusively to licensed agents pursuant to section 334.3 of this Title;

(ii) the United States or voluntary unincorporated organizations of the armed forces of the United States pursuant to section 336.2 of this Part;

(iii) persons through bonded warehouses to diplomatic missions and diplomatic personnel pursuant to section 336.4 of this Part; and

(iv) [exempt Indian nations or tribes, nation or tribal businesses and registered reservation dealers on qualified Indian reservations pursuant to sections 336.6 and 336.7 of this Part; and

(v)] any other persons under any circumstances in which the State is without power by reason of the United States Constitution and any laws enacted pursuant thereto.

Accordingly, no dealer other than a licensed cigarette agent and the aforementioned persons and entities may sell or purchase for resale, in New York State, cigarettes upon which the cigarette tax has not been prepaid and precollected, and

the terms seller and purchaser for resale, or the like, as used hereafter in this Part shall be read with such understanding. Moreover, nothing in this Part shall be construed as authorizing the sale or purchase of cigarettes upon which the seller has not prepaid and precollected the cigarette tax for any purpose other than for the proper administration of the exemptions from the cigarette tax imposed pursuant to article 20 of the Tax Law.

§ 2. Sections 336.6 and 336.7 of such regulations are hereby REPEALED.

§ 3. Paragraph (5) of subdivision (a) of section 414.1 of such regulations is hereby REPEALED.

§ 4. Sections 414.6 and 414.7 of such regulations are hereby REPEALED.

§ 5. Part 435 of such regulations is hereby REPEALED.

§ 6. Paragraph (2) of subdivision (b) of section 561.1 of such regulations is hereby REPEALED and the remainder of such subdivision is amended to read as follows:

(b) [(1)] Every distributor of motor fuel must pay a prepaid sales tax on each gallon of motor fuel which it: [(i)] (1) imports or causes to be imported into this State for use, distribution, storage or sale in the State; or [(ii)] (2) produces, refines, manufactures or compounds in this State. Such prepaid tax is based on the prescribed regional average retail sales price and must be passed through to subsequent purchasers purchasing for resale.

§ 7. Subdivision (f) of section 561.3 of such regulations is hereby REPEALED.

§ 8. Section 561.17 of such regulations is hereby REPEALED and section 561.18 is renumbered to be section 561.17.

§ 9. Section 562.2 of such regulations is hereby REPEALED.

§ 10. Section 564.2 of such regulations is hereby REPEALED.

/s/ Michael H. Urbach
MICHAEL H URBACH
Commissioner of Taxation
and Finance

DATED: Albany, New York
April 13, 1998

It is hereby certified that the foregoing is a true copy of an amendment to the regulations with respect to the Cigarette Tax, the Motor Fuel. Tax, the Diesel Motor Fuel Tax and the Sales and Use Taxes, duly adopted by the Commissioner of Taxation and Finance on April 13, 1998, at an open meeting held in Albany, New York, pursuant to the authority contained in Section 171, subdivision First; section 289-f (not subdivided); section 475 (not subdivided); and section 1142, subdivisions (1), (11) and (12), of the Tax Law, which regulation was proposed on January 23, 1998, at an open meeting of the Commissioner of Taxation and Finance, notice of such proposal having been published in the State Register on February 11, 1998, and notice of the open meeting having been given by Press Release No. 1 dated January 20, 1998, and no other publication of such proposal. being required by statute.

The amendment is effective on the date the Notice of Adoption is published in the State Register.

DATED: Albany, New York
April 13, 1998

/s/ Karen McCarthy-Townsend
KAREN MCCARTHY-TOWNSEND
Secretary to the Commissioner
of Taxation and Finance

APPENDIX K

20 NYCRR 335.6

335.6 Indian Nations or Tribes, Qualified Indian Consumers and Registered Dealers. [Tax Law §§ 471, 471-a and 475]

(a) As provided for in this section and section 335.7 of this Part, exempt Indian nations or tribes, qualified Indian consumers and registered dealers (as defined herein) may purchase, on qualified reservations, cigarettes upon which the seller has not prepaid and precollected the cigarette tax imposed pursuant to article 20 of the Tax Law.

(b)(1)(i) Qualified Indian for purposes of this section means a person, duly enrolled on the tribal rolls of one of the exempt Indian nations or tribes.

(ii) Qualified Indian consumer for purposes of this section means a qualified Indian who purchases or intends to purchase cigarettes within the boundaries of a qualified reservation for such Indian's own use or consumption (i.e. other than for resale) within such reservation.

(2) Exempt Indian nation or tribe for purposes of this section means one of the following New York State Indian nations or tribes: Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

(3) Qualified reservation for purposes of this section means the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian reservation, Poospatuck Indian reservation, St. Regis Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.

(4) Registered dealer for purposes of this section means:

(i) an Indian or non-Indian retail dealer (including but not limited to a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(a) registers with the Department of Taxation and Finance; and

(b) makes or intends to make qualified sales of cigarettes on a qualified reservation; or

(ii) a qualified Indian who is a wholesale dealer (including, but not limited to, a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(a) registers with the Department of Taxation and Finance; and

(b) makes or intends to make qualified sales of cigarettes on qualified reservations.

(5) Qualified sale for purposes of this section means a sale of cigarettes made on a qualified reservation by an agent, an exempt Indian nation or tribe, or a registered dealer, without prepayment and precollection of the cigarette tax to an exempt Indian nation or tribe, a registered dealer, or a qualified consumer.

(c) Although stamps are usually affixed to packages of cigarettes as evidence of payment of tax, the Commissioner of Taxation and Finance may authorize the use of a special stamp in order to clearly identify packages of cigarettes which are intended for nontaxable sales to qualified Indians on qualified reservations. If such special stamps are so authorized, the special stamps constitute documentary

evidence of non-payment of the tax and, if possessed by a registered dealer or an Indian for resale outside the boundaries of a qualified reservation, or by a non-Indian or a non-qualified Indian, such specially stamped packages of cigarettes are deemed to be unstamped packages of cigarettes. Cigarettes, upon which the tax has not been prepaid and precollected, and which bear such special stamps may not be sold to non-Indians or non-qualified Indians under any circumstances. In addition, any such specially stamped packages of cigarettes may not be sold outside the boundaries of a qualified reservation, unless such sale is specifically authorized by this Part.

(d) Exempt Indian nations or tribes.

(1) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for its own use or consumption, or for making qualified sales, provided that the nation or tribe:

(i) holds a valid exempt organization certificate issued by the New York State Department of Taxation and Finance;

(ii) takes delivery of the cigarettes on its qualified reservation; and

(iii) uses, or intends to use, such cigarettes for its own official use or consumption within such reservation, or to make qualified sales.

(2) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller a properly completed certificate of exemption for qualified Indian nations or tribes. Such exemption certificate must disclose the Indian nation's or tribe's exempt organization number referred to in section 529.9(b) of this Title.

(3) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the authority of such nation or tribe to purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for purposes of making qualified sales.

(e) Qualified Indian consumers.

(1) a qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, if such individual:

(i) takes delivery of the cigarettes on a qualified reservation; and

(ii) purchases the cigarettes for such individual's own use or consumption within such reservation.

(2) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, by issuing to the seller of the cigarettes a properly completed certificate of individual Indian exemption for certain taxes on property delivered on a reservation.

(f) Registered dealers.

(1) Upon application, the Department of Taxation and Finance may register an applicant and issue a certificate of registration as a dealer of cigarettes to such applicant, if the applicant:

(i)(a) is an Indian or non-Indian retail dealer who or which makes, or intends to make, qualified sales within the boundaries of a qualified reservation; or

(b) is a qualified Indian, who is also a wholesale dealer, who makes, or intends to make, qualified sales within the boundaries of a qualified reservation;

(ii)(a) has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law which has finally been determined to be due from such applicant; and

(b) is properly licensed or registered for any applicable taxes (e.g. that the applicant has a valid certificate of authority for the sales tax pursuant to Tax Law section 1132(c)); and

(iii)(a) provides evidence to the department that such applicant has complied (or will comply) with any applicable tribal regulations and/or licensing procedures; and

(b) has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant.

(2) Unless so registered, or otherwise specifically provided for in this Part, no person shall sell cigarettes within a qualified reservation without prepayment and precollection of the cigarette tax. No fee is charged for this registration.

(3) A registered dealer may purchase cigarettes upon which the seller has no prepaid and precollected the cigarette tax for purposes of making qualified sales, provided that the registered dealer:

(i) has received from the department a valid certificate of registration as a dealer of cigarettes;

(ii) takes delivery of such cigarettes within the boundaries of its qualified reservation; and

(iii) uses or intends to use such cigarettes to make qualified sales.

(4) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller of such cigarettes a properly completed certificate of exemption. Such exemption certificate must indicate such dealer's registration number.

(5) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the registration as a dealer of cigarettes.

(g)(1) The exemption certificates prescribed in subdivision (d), (e) and (f) of this section must be completed by the purchaser and given to the seller of cigarettes upon which the tax has not been prepaid and precollected, at the time of an initial purchase. A separate exemption certificate need not be given for each additional purchase of cigarettes, provided that each delivery of such cigarettes is substantiated as being exempt from tax with an individual bill, invoice, receipt or other form of written evidence given by the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser.

(2) Every bill, invoice, receipt or other form of written evidence given by the seller must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to be paid by the exempt purchaser for such cigarettes. In addition, such evidence of each exempt transaction must be retained by the seller and must be signed and dated by the individual taking delivery of the cigarettes. In the case of a purchase by an exempt Indian nation or tribe, such evidence must also indicate such nation's or tribe's exempt organization number. In the case of a purchase by a registered dealer, such evidence must also indicate the dealer's registration number.

(3) Sellers of cigarettes upon which the tax has not been prepaid and precollected must establish an acceptable system of associating copies of these individual bills, invoices, receipts and other forms of written evidence of exemption from tax with the applicable tax exemption certificates initially received from the purchasers.

(4) A licensed cigarette agent must report all sales of cigarettes to exempt Indian nations or tribes, qualified Indian consumers and registered dealers in its monthly cigarette tax return.

APPENDIX L

20 NYCRR 335.7

335.7 Qualified Sales of Cigarettes on Qualified Reservations. [Tax Law, §§ 471, 471-a 475 and 481(2)]

(a)(1) The cigarette tax imposed pursuant to article 20 of the Tax Law is not required to be prepaid and pre-collected when cigarettes are sold under circumstances which preclude the imposition of the tax by reason of the United States Constitution and any laws of the United States enacted pursuant thereto.

(2) Federal constitutional and statutory principles relating to Indian sovereignty, preempt the application of a state cigarette excise tax to a sale of cigarettes on a qualified reservation, if such cigarettes are ultimately purchased on such reservation by a qualified Indian for such Indian's own personal use or consumption. Consistent with such federal principles, sales of cigarettes on a qualified reservation to a non-Indian and non-qualified Indian are subject to the tax since the ultimate incidence of, and liability for, the tax is upon the non-Indian or non-qualified consumer. Additionally, consistent with such principles, all sales of cigarettes made within a state and outside the boundaries of a qualified reservation, regardless of whether the seller and/or the purchaser is an exempt Indian nation or tribe, a registered dealer, or a qualified Indian consumer, are subject to a state's cigarette excise tax.

(b)(1) An agent licensed by the Department of Taxation and Finance to purchase and affix stamps may possess cigarettes upon which the tax has not been prepaid and precollected for purposes of making qualified sales, if that agent-with the prior approval of the Department of Taxation and Finance, or, if applicable, of an exempt Indian nation or tribe-sells and delivers such cigarettes to:

(i) an exempt Indian nation or tribe;

(ii) a registered dealer; or

(iii) a qualified Indian consumer.

(2) No person other than a duly licensed cigarette agent (and its employees) may possess cigarettes for sale in this State and transport such cigarettes onto a qualified reservation located in this State without prepaying and precollecting the cigarette tax. However, as provided in section 335.6 of this Part, subsequent qualified sales may be made solely on such qualified reservations. Properly completed exemption certificates must be received by all sellers of cigarettes, where the tax has not been prepaid and precollected.

(3) In order to administer the cigarette tax with respect to the sale of cigarettes on qualified reservations consistent with federal constitutional and statutory principles, a cigarette agent may sell and deliver cigarettes without prepayment and precollection of the cigarette tax to exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that such agent complies with the applicable provisions of subdivisions (c) and (d) of this section with respect to approval of the amount of such cigarettes to be sold and delivered, and further complies with all of the requirements of this Subchapter.

(c)(1) If an exempt Indian nation or tribe agrees with the Department to regulate, license, or control the sale and distribution within its qualified reservation of an agreed upon amount of cigarettes upon which the seller has permissibly not prepaid and precollected the cigarette tax, then an agent must obtain the approval for delivery from that nation or tribe regarding the agreed upon amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(2) In the absence of such an agreement regarding the sale and distribution of cigarettes upon which the tax has not been prepaid and precollected, the agent must obtain the approval for delivery from the department regarding the amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(d)(1) If applicable, departmental approval for delivery will be based upon evidence of valid purchase orders received by the agent of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation or tribe (if such nation or tribe chooses to make qualified sales), or registered dealer.

(2) In determining such probable demand, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such probable demand (e.g. records of previous sales or qualified Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence, etc.); or

(ii) in the absence of such regulation or such evidence, calculate such demand based upon the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe (or, if such membership numbers are unavailable, by the reservation service area population, as compiled by the Federal Bureau of Indian Affairs).

(3) In determining such trade territory, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such regulated and/or licensed sellers located on its reservation; or

(ii) in the absence of such regulation or such evidence, calculate such trade territory based upon the information at its disposal.

(4) In addition, the department will also take into consideration any evidence submitted by a registered dealer relating to such probable demand and to that dealer's trade territory (e.g. a verified record of previous sales to qualified Indian consumers, evidence of the number of qualified Indian consumers located within a reasonable distance of the dealer's place of business, records indicating the percentage of such trade historically realized by the dealer, or other statistical evidence in support of the proposed transaction).

(5) In the absence of any such evidence by an exempt Indian nation or tribe or a registered dealer, the department may restrict the total deliveries to any reservation of cigarettes, upon which the tax has not been prepaid and precollected, to an amount calculated pursuant to subparagraphs (2)(ii) and (3)(ii) of this subdivision.

(6) Approval for sale or delivery to an exempt nation or tribe or to a registered dealer will be denied where the department finds that such nation or tribe, or dealer are or have been making sales in violation of this Subchapter.

(e) Exempt Indian nations or tribes, qualified Indian consumers, and registered dealers may purchase cigarettes upon which the seller has not prepaid and precollected the tax, only to the extent provided in this section and in section 335.6 of this Part. The possession within this State at any one time of more than 400 cigarettes in unstamped (or unlawfully stamped) packages by any Indian nation or tribe, qualified

Indian consumer or registered dealer, except as provided herein, shall be presumptive evidence that such cigarettes are subject to tax. Such Indian nations or tribes, consumers, and dealers, who or which purchase cigarettes under any other circumstances must prepay or pay, as the case may be, the cigarette tax at the time of purchase by remitting the tax to the seller as part of the purchase price of the cigarettes.

Supreme Court, U.S.
FILED
NOV
OFFICE OF THE CLERK

No. 01-560

IN THE

Supreme Court of the United States

NEW YORK ASSOCIATION OF CONVENIENCE STORES, NATIONAL ASSOCIATION OF CONVENIENCE STORES, and M.W.S. ENTERPRISES, INC.,

Petitioners,

v.

ARTHUR J. ROTH, COMMISSIONER OF THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF IN OPPOSITION

Of Counsel:

CAITLIN J. HALLIGAN*
Solicitor General

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the New York courts properly held that there was a rational basis under the Equal Protection Clause supporting New York's policy of refraining from enforcement of the State's sales and excise taxes on cigarettes and motor fuel sold on Indian reservations to non-Indians.

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STATEMENT OF THE CASE

Petitioners New York Association of Convenience Stores, et al., seek this Court's review of decisions of the New York Appellate Division, Third Department, and the New York Court of Appeals that rejected petitioners' equal protection challenge to New York's policy of refraining from enforcing the State's sales and excise taxes on cigarettes and motor fuel sold on Indian reservations to non-Indians. *See New York Association of Convenience Stores v. Urbach*, 699 N.E.2d 904 (N.Y. 1998), *on remand*, 694 N.Y.S.2d 885 (N.Y. Sup. Ct. 1999), *aff'd*, 712 N.Y.S.2d 220 (N.Y. App. Div.), *appeal dismissed*, 744 N.E.2d 142 (N.Y. 2000), *lv. denied* (N.Y. July 2, 2001).

In 1998, the Court of Appeals held that respondents' failure to enforce the taxes at issue did not constitute race-based discrimination subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. 699 N.E.2d at 908. Instead, the Court found that respondents' policy of forbearance was "predicated on [respondents'] sensitivity to both tribal sovereignty issues and the complex restrictions imposed by the Indian Trader Laws." *Id.* The Court remanded the proceeding to the New York Supreme Court to determine whether respondents' policy was "sustainable under a rational basis analysis." *Id.* at 909.

On remand, Supreme Court held that the policy satisfied the rational basis standard. 694 N.Y.S.2d at 889-890. The court sustained the nonenforcement policy, finding it rationally based in light of respondents' extensive attempts to resolve the tax collection issues through product seizures and litigation as well as through negotiated compromise and legislation. 694 N.Y.S.2d 888-889. The Appellate Division,

Third Department, affirmed. 712 N.Y.S.2d 220 (N.Y. App. Div. 2000). That court observed that the State's attempt to enforce the taxes at issue in 1997 while this litigation was pending resulted in civil unrest and showed that the tax collection regulations upheld by this Court in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), were unworkable without cooperation from the Indian retailers. 712 N.Y.S.2d at 222. The Court of Appeals dismissed petitioners' subsequent appeal for want of a substantial constitutional question, 744 N.E.2d 142 (N.Y. 2000), and then denied petitioners' motion for leave to appeal. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

Petitioners urge this Court to grant certiorari in order to resolve a purported conflict between the decisions below and decisions of this Court and others regarding the proper equal protection standard of review applicable to special treatment of Indians. Pet. at 3. Petitioners are wrong; there is no such conflict. In holding that the State's nonenforcement policy is a constitutionally permissible response to the tax enforcement problems resulting from the unique political attributes of Indian nations under federal law, the courts below explicitly relied upon the rational basis standard as previously applied by this Court to state treatment of Indians. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979) (special treatment is valid "unless [it] bear[s] no rational relationship to the State's objectives"); *see also New York Association of Convenience Stores*, 699 N.E.2d at 908 (citing *Yakima Indian Nation*). Because this case presents no cert-worthy issues that merit review by the Court, the petition for certiorari should be denied. *See* Sup. Ct. R. 10(b), (c).

I. THE DECISIONS BELOW DO NOT CONFLICT WITH DECISIONS OF THIS COURT, UNITED STATES CIRCUIT COURTS, OR OTHER STATE COURTS OF LAST RESORT REGARDING THE LEVEL OF EQUAL PROTECTION SCRUTINY APPLICABLE TO CLASSIFICATIONS INVOLVING INDIANS.

Petitioners' arguments for certiorari are premised on the unsound contention that the decisions below are in conflict with language contained in this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), and quoted in decisions of the Fifth, Eighth and Ninth Circuits and the highest courts of Maine and Vermont.[1] Petitioners essentially claim that the language of these decisions recognized a new level of equal protection scrutiny applicable to special treatment of Indians that is more stringent than ordinary rational basis review. Pet. at 3, 17 n.5 (claiming that the new equal protection standard is "somewhat akin" to intermediate scrutiny). This argument is meritless.

A. The decisions below do not conflict with this Court's *Mancari* line of cases.

There is no conflict between the decisions below and *Mancari* and its progeny. In *Mancari*, this Court rejected an equal protection challenge to a Bureau of Indian Affairs (BIA)

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1. *See Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998); *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991); *United States v. Aanerud*, 893 F.2d 956 (8th Cir.), *cert. denied*, 498 U.S. 822 (1990); *In re A.J.*, 733 A.2d 36 (Vt. 1999); *In re Marcus S. et al.*, 638 A.2d 1158 (Me. 1994).

Indian hiring preference. The Court rejected the argument that the preference constituted racial discrimination or was even a racial preference. 417 U.S. at 553. The Court found that the preference was "political rather than racial in nature" because it applied to Indians not as a discrete racial group but as members of federally recognized tribes that were quasi-sovereign entities governed by the BIA in a unique fashion. *Id.* at 553 n.24. The Court found that the preference was reasonably related "to a *legitimate, nonracially based goal.*" *Id.* at 554 (emphasis added). That is the language of conventional rational basis scrutiny, and that was the standard this Court applied in *Mancari*.

It is true that in *Mancari*, 417 U.S. at 555, and subsequent cases the Court has stated that "fulfillment of Congress' unique obligation toward the Indians" is a legitimate governmental interest justifying special treatment of Indians, favorable and unfavorable alike.[2] However, the Court has

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2. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 673 n.20 (1979) (treaty rights allowing special fishing rights to Indians upheld, citing *Mancari)*; *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-502 (1979) (rejecting the Nation's equal protection challenge to Washington's assertion of partial jurisdiction over the reservation under a state law enacted pursuant to a federal statute); *United States v. Antelope*, 430 U.S. 641, 645-650 (1977) (rejecting equal protection challenge to the application of federal murder statutes to Indian defendants when more favorable state law would have applied to non-Indians); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85-86 (1977) (rejecting equal protection challenge to a federal statute providing for the distribution of the proceeds of an award for the breach of a treaty but excluding individual Indians who were not a recognized tribal entity and had no vested rights in any tribal property); *Moe v.*

(Cont'd)

routinely upheld the special treatment of Indians against equal protection challenges and has never held or even suggested that such treatment is subject to a heightened form of rational basis scrutiny under *Mancari*. Nor can the Court's identification of this specific governmental interest be understood to mandate the heightened scrutiny advocated by petitioners. In any event, the courts below found that the challenged policy does, in fact, advance the sovereignty interests referred to in *Mancari*. *See* 699 N.E.2d at 908 (policy "is predicated on the Department's sensitivity to . . . tribal sovereignty issues"); 712 N.Y.S.2d at 222 (referring to need for tribal cooperation in enforcement of the taxes).

Two decisions of this Court following *Mancari* make clear that the rational basis scrutiny applicable to Indian classifications is the same as that uniformly applied in other equal protection cases. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Court applied "conventional Equal Protection Clause criteria" in rejecting the Yakima Nation's challenge to Washington's assertion of partial jurisdiction over the reservation under a state law enacted pursuant to federal law. 439 U.S. at 501. The Court held that "[u]nder those criteria, legislative classifications are valid unless they bear no

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(Cont'd)

Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 479-480 (1976) (rejecting equal protection challenge to tax immunity based on federal law granted to Indians on reservations, including immunity from the cigarette sales tax as applied to on-reservation sales by Indians to Indians); *Fisher v. District Court*, 424 U.S. 382, 390-391 (1976) (rejecting equal protection challenge to denial of Indian access to state courts to pursue adoption proceedings when all the parties were Indians who lived on the reservation).

rational relationship to the State's objectives." *Id.* (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 [1976]). Additionally, in *United States v. Antelope*, 430 U.S. 641, 647 n.8 (1977), the Court, citing *Mancari*, rejected the claim that the application of federal murder statutes to Indian defendants when more favorable state law would have applied to non-Indians amounted to invidious racial discrimination. The Court noted that "respondents do not seriously contend that application of federal law to Indian tribes *is so irrational* as to deny equal protection." *Id.* (emphasis added).

The New York Court of Appeals cited *Yakima Nation* and *Mancari* in support of its holding below that New York's policy of forbearance did not amount to invidious discrimination based on race because the policy responded to the sovereign attributes of Indian reservations under federal law. 699 N.E.2d at 908. On remand, the New York Supreme Court and Appellate Division correctly applied the rational basis test as set forth in *Yakima Nation*.[3]

Finally, there is no conflict between the decisions below and this Court's decisions in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) and *Rice v. Cayetano*, 528 U.S. 495 (2000). *Adarand* held that strict scrutiny must be applied to all racial classifications. 515 U.S. at 227. The majority in

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3. The courts below did not consider the question that petitioners now ask this Court to decide because petitioners did not argue below that the standard of equal protection review applicable in this proceeding is the heightened form of rational basis scrutiny that they now contend is applicable to classifications involving Indians. Following the remand by the Court of Appeals, petitioners argued only that respondents' policy was not rationally related to a purpose of the tax statutes at issue.

Adarand did not even suggest that the rule of *Mancari*, holding that Indian preferences were political rather than racial in nature, was at odds with *Adarand*. *Cf. Adarand*, 515 U.S. at 244 n.3 (Stevens, J., dissenting) (citing *Mancari*); *Williams v. Babbit*, 115 F.3d at 665 (suggesting in dictum that *Adarand* is in tension with *Mancari*). *Rice* involved voting rights under the Fifteenth Amendment, not the Equal Protection Clause, and dealt with native Hawaiians, whom the Court refused to analogize to Indians. 528 U.S. at 518-519. Nor did the *Rice* Court's discussion of *Mancari* and its progeny suggest that *Mancari* had created a new level of equal protection scrutiny or that *Mancari* was no longer good law. *Id.* at 518-522. Consequently, the New York courts properly followed this Court's precedents in upholding the policy at issue here.

B. There is no conflict between the decisions below and those of the Circuit and State courts that petitioners rely on.

The decisions below also do not conflict with the circuit and state cases relied upon by petitioners. Petitioners do not cite a single decision holding that any State violated the Equal Protection Clause by not enforcing state cigarette and motor fuel taxes on sales made to non-Indians on Indian reservations.[4] Even more generally, none of the decisions cited by petitioners invalidated on equal protection grounds special treatment favoring Indians similar to that alleged to exist here. Finally, none of these decisions stated that the

4. This Court has held that immunizing reservation sales of cigarettes to tribe members from state cigarette taxes does not violate the Equal Protection Clause. *See Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479-480 (1976).

rational basis scrutiny applied to such treatment in fact constitutes a more stringent form of rational basis review.

A conflict within the meaning of Rule 10 should involve holdings that are squarely in conflict rather than language that is at most arguably inconsistent. *See* Sup. Ct. R. 10(b), (c); *cf. Yee v. City of Escondido, California*, 503 U.S. 519, 537-538 (1992) (suggesting that conflicting "results" are what count for purposes of Rule 10). The holdings of the decisions cited by petitioners are not at odds with the decisions below. In fact, the cases cited by petitioners are largely consistent with the decisions in this case, because, with one exception, *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998), the decisions all upheld the special treatment of Indians. In *Williams*, the Ninth Circuit's equal protection analysis suggested that a preference regarding the Alaska reindeer industry for natives, unrelated to native land, tribal or communal status, was problematic. But this analysis was dictum, because the court interpreted the statute as not permitting the preference and thus found "no reason to unnecessarily resolve" the constitutional question. 115 F.3d at 666.

Moreover, in *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982), the Ninth Circuit rejected the argument that *Mancari*'s holding should be limited to special treatment furthering Indian self-government, upholding a federal preference for Indian contractors to build housing for Indians. The court found that in *Mancari* this Court had "applied *the rational basis test* to the legislation because of the unique legal status of Indian tribes under federal law" and had found that "the BIA preference was designed *to further a legitimate governmental purpose.*" 694 F.2d at 1167 (emphasis added). The Ninth Circuit's reading of *Mancari* to apply traditional

principles of rational review was also evident in *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 722 (9th Cir. 1986), where the court held that "[t]he state's interest in controlling the distribution of liquor within its borders" insulated the tribal liquor vendor contracts at issue from equal protection challenge, thus belying petitioners' contention here that special treatment of Indians must be tied solely to Indian concerns. *See also United States v. Decker*, 600 F.2d 733, 740-741 (9th Cir.) (upholding treaty preference for Indian salmon fishing), *cert. denied*, 444 U.S. 855 (1979). The holdings of these Ninth Circuit decisions are not at odds with the decisions below.

Similarly, neither the Fifth Circuit's decision in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (upholding an Indian exception to state and federal laws prohibiting possession of peyote) nor the Eighth Circuit's decision in *United States v. Aanerud*, 893 F.2d 956 (8th Cir.) (upholding a treaty-based Indian exception to the prohibition on the trapping of leeches), *cert. denied*, 498 U.S. 822 (1990), conflicts with the decisions below. In *Peyote Way*, the court specifically found that the Indian exemption was "rationally related to the legitimate governmental objective of preserving Native American culture." 922 F.2d at 1216 (footnote omitted). *See also United States v. Eagleboy*, 200 F.3d 1137 (8th Cir. 1999) (upholding an informal policy not to prosecute members of federally recognized tribes for possession of bird parts in violation of federal migratory bird statute); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir.) (upholding a New Mexico policy that allowed only Indians to sell handcrafted goods at a historic site), *cert. denied*, 444 U.S. 870 (1979).

Thus, none of the circuit cases that petitioners rely on invalidated an Indian preference on equal protection grounds, and none held that the rational basis standard applicable to such preferences is more stringent than conventional rational basis scrutiny. Likewise, the two state cases cited by petitioners, *In re A.J.*, 733 A.2d 36 (Vt. 1999), and *In re Marcus S., et al.*, 638 A.2d 1158 (Me. 1994), also rejected equal protection challenges to federal Indian child welfare legislation and did not hold or even suggest that heightened rational basis scrutiny was required.

Indeed, petitioners cite only one case, *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998), in which the court explicitly considered the argument that special treatment of Indians is subject to a heightened form of rational basis scrutiny. In *Narragansett*, the District of Columbia Circuit rejected the argument, holding that "*Mancari* merely applied ordinary rational basis analysis to determine whether the employment preference rationally related to the government's interest in fulfilling its trust obligation." 158 F.3d at 1340. As did the New York courts below, the *Narragansett* court upheld the special Indian treatment at issue (there, the exclusion of the Tribe from Indian gaming) against an equal protection challenge. Accordingly, there is no conflict between the holdings of the decisions below and the holdings of the circuit court and state supreme court decisions on which the petition for certiorari is based.

C. This Court has not recognized a "fourth level" of equal protection scrutiny.

In its equal protection jurisprudence generally, this Court has never recognized the existence of the "fourth level" of equal protection scrutiny urged by petitioners. *See Clark v. Jeter*,

486 U.S. 456, 461 (1988) (recognizing three levels of equal protection scrutiny). Classifications based on race, alienage or national origin and laws affecting fundamental rights are subject to strict scrutiny. *Id.*; *see also City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). The Court applies an intermediate level of scrutiny to classifications based on sex and illegitimacy. *Nguyen v. Immigration and Naturalization Service*, 121 S. Ct. 2053, 2059 (2001) (sex); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (illegitimacy). All other classifications are subject to the rational basis standard, "which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause," *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989), requiring "only that the classification rationally further a legitimate state interest," *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citations omitted). *See also Federal Communications Commission v. Beach Communications*, 508 U.S. 307, 313 (1993) (a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"). There is only one rational basis test and it was correctly applied here by the New York courts.

II. THE DECISIONS BELOW DO NOT CONFLICT WITH ANY OTHER DECISIONS OF THIS COURT.

Petitioners make the groundless assertion that, in addition to conflicting with *Mancari*, the decisions below are at odds with other decisions of the Court regarding the taxation of Indian tribes. Pet. at 23-24. First, there is no conflict between the decisions below and this Court's

decision in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). In *Attea*, this Court rejected a facial challenge, based on the Indian trader laws, 25 U.S.C. §§ 261-266, to respondents' cigarette tax collection regulations. In upholding the facial validity of the regulations, the Court nevertheless recognized that future litigation might be necessary to resolve issues regarding their implementation. 512 U.S. at 77.

Attea was not an equal protection case and accordingly did not address any equal protection ramifications of respondents' subsequent determination not to enforce the regulations. Nor did *Attea* negate or diminish the practical and legal impediments to tax collection and enforcement resulting from the substantial attributes of sovereignty possessed by the Indian tribes under federal law and from the fact that tribal customers were entitled to obtain tax-free products. *See New York Association of Convenience Stores v. Urbach*, 694 N.Y.S.2d 885, 888-889 (N.Y. Sup. Ct. 1999) (recounting the history of respondents' tax enforcement attempts).

Although the Court recognized in *Oklahoma Tax Commission v. Citizen Band Potawatami Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-162 (1980), that States are not powerless to collect taxes on reservation sales to non-Indians, in the present case New York tried several collection options, including tax agreements and off-reservation seizures, and found them unsatisfactory. *See New York Association of Convenience Stores*, 712 N.Y.S.2d at 222 (N.Y. App. Div. 2000) (determining that respondents could not enforce the taxes without the cooperation of the tribes and that the

interception and seizure of shipments resulted in civil unrest); *see also* Notice of Adoption, N.Y. St. Reg., April 29, 1998, pp. 22-24 (explaining that respondents repealed the *Attea* regulations only after determining that there was no practical way to enforce them). *Attea*, *Potawatomi* and *Colville* thus do not mandate that States collect taxes on reservation sales of cigarettes and gasoline to non-Indians in order to comply with the dictates of the Equal Protection Clause.

III. THE PETITION FOR CERTIORARI DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The question that petitioners are asking this Court to resolve does not raise any important questions of federal law. The question of the proper level of equal protection scrutiny applicable in Indian cases is settled. As set forth in Point I, above, this Court has upheld the special treatment of Indians against equal protection challenges using conventional rational basis scrutiny. The Court's consideration of the present case would add nothing to its existing Indian equal protection jurisprudence. The courts below found that the State's policy was rational because it recognized the plain and unalterable fact that reservation retailers are uniquely situated when compared to petitioners and their members. The New York courts determined that the unique characteristics of the reservation retailers implicate far different tax enforcement concerns than those applicable to merchants located outside the reservations. This holding is completely consistent with the *Mancari* line of cases.

The state and lower federal courts have applied *Mancari* without generating the conflict posited by petitioners. The New York courts did not decide an important question of federal

law in a way that conflicts with another state court of last resort or of a United States court of appeals. Sup. Ct. R. 10(b). Nor did the New York courts decide such a question that has not been, but should be, settled by this Court, or in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). Consequently, nothing in this case merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-560

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

NEW YORK ASSOCIATION OF CONVENIENCE STORES, NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND M.W.S. ENTERPRISES, INC.,

Petitioners,

v.

ALAN J. ROTH, COMMISSIONER OF THE DEPARTMENT OF TAXATION, and FINANCE OF THE STATE OF NEW YORK, and THE DEPARTMENT OF TAXATION and FINANCE OF THE STATE OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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REPLY BRIEF OF PETITIONERS

Contrary to Respondents' arguments, this case presents a square conflict concerning the test that courts should apply to determine whether laws or policies that treat Native Americans differently than non-Native Americans are constitutional. More specifically, the issue is whether such disparate treatment must be rationally related to "Congress' unique obligation to Native Americans," or whether any legitimate governmental interest is sufficient. The New York Court of Appeals and District of Columbia Circuit have applied the latter, traditional rational basis test. The Fifth, Eighth, and Ninth Circuits and the Maine and Vermont Supreme Courts, on the other hand, have held that equal protection requires application of the former, more tailored inquiry as dictated by this Court's decision in *Morton v. Mancari*, 417 U.S. 535, 555 (1974), and, in some cases, have expressly recognized the confusion among the lower courts on precisely this question. The significance of this distinction in the context of this case cannot be overstated – the preference at issue would have been struck down had the New York court applied *Mancari* rather than the lower rational basis test. This case therefore squarely and cleanly presents the equal protection issue that has generated this confusion among the state and federal courts and, thus, is an ideal vehicle for the resolution of the conflict.

1. Decisions by the New York Court of Appeals and District of Columbia Circuit in cases challenging the special treatment of Native Americans form one side of the conflict, both courts flatly holding that judicial review of such laws requires only "ordinary" rational basis scrutiny. The consequence of this conclusion in both cases was that governmental action that was rationally tied to state interests was upheld even though such interests were completely unrelated to furthering Congress' unique obligations toward Native Americans.

The decision below provides perhaps the starkest example because the New York Court of Appeals concluded that "any reasonably conceivable state of facts" could provide a rational basis for the State's policy favoring Native Americans. Applying this standard, the New York Appellate Division thus upheld the State's policy of forbearance in enforcing statutorily-mandated sales tax collection requirements based solely on the prevention *off of the Indian reservations* of the "civil unrest, personal injuries and significant interference with transportation on the State highways" that Indians in New York perpetrated during the brief time when the interception and seizure laws were enforced against them. *New York Association of Convenience Stores v. Urbach*, 712 N.Y.S.2d 220, 222 (App. Div. 2000); Pet. App. B at 5a. Respondents' contention that the New York court arrived at this conclusion simply by applying *Mancari* is directly contradicted by the court's opinion, which expressly states that ordinary rational basis scrutiny was applied, *see id.*, and, moreover, defies logic. It is difficult to understand how maintaining the peace *off the reservation* can be viewed as furthering Congress' unique obligations to Native Americans. If it could, then *Mancari* would be a dead letter and this Court's requirement of looking to Congress' "treaty obligations [or] its responsibilities to the Indian tribes" would be meaningless. *Rice v. Cayetano,* 528 U.S. 495, 519-20 (2000) (reaffirming the continued centrality of *Mancari).*

Likewise, in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335, 1341 (D.C. Cir. 1998), the D.C. Circuit upheld legislation prohibiting gambling on *Narragansett* lands based on two "appropriate" governmental purposes: Rhode Island's interest in regulating gambling and the fact that the State had jurisdiction over the lands in question. Satisfied that these interests were sufficient to satisfy the tenets of equal protection, the D.C.

Circuit refused to consider whether the legislation at issue furthered "Congress' unique obligation toward Native Americans" as *Mancari* requires. *Id.* at 1340-41.

On the other side of the conflict are the Fifth, Eighth, and Ninth Circuits and the Maine and Vermont Supreme Courts, which apply a test specifically reserved for laws or policies that are predicated on Native American classifications. The Ninth Circuit has expressly characterized this brand of scrutiny as derived from *Mancari* and, moreover, as "shielding only those statutes that affect uniquely Indian interests." *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997), *cert. denied, Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998).[1] *See also Peyote Way Church of God, Inc. v. Thornburg*, 922 F.2d 1210, 1216 (5th Cir. 1991) (specifically premising constitutionality of exemption allowing tribal use of peyote on rational relationship to governmental objective of preserving Native American culture); *United States v. Aanerud*, 893 F.2d 956 (8th Cir. 1990) (upholding right to trap leeches specifically because tribes' right to hunt, fish and gather wild rice on reservation was "sufficiently tied to 'the fulfillment of Congress' unique obligation toward the Indians'"); *In re A.J.*, 733 A.2d 36, 38 (Vt. 1999) (upholding special treatment of federally recognized tribes under Indian

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[1] Respondents' attempt to drive a wedge between the test identified in *Williams* and the one the Ninth Circuit applied in *Alaska Chapter, Associated General Contractors, Inc. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982), Opp. at 8-9, fails for two reasons. First, *Pierce* applied *Mancari*, not the ordinary rational basis test as Respondents contend, and specifically held that "the challenged [HUD regulation] is rationally related to the fulfillment of Congress' unique obligation toward Indians and Alaska Natives." *Pierce*, 694 F. 2d at 1170. Second, its premise rests on the erroneous equation of "Indian self-government" with the interest at issue in *Mancari* – Congress' unique obligation to Native Americans. The latter is broader and, in addition to tribal self-regulation, includes other Indian interests; this distinction is expressly recognized in *Williams*. *See* 115 F.3d at 665.

Child Welfare Act because purpose was to preserve culture of tribes that Congress has assumed the responsibility of protecting); and *In re Marcus S.*, 638 A.2d 1158, 1159 (Me. 1994) (specifically premising constitutionality of reduced burden of proof in Indian Child Welfare Act case on "special status" of Indians and corresponding goal of Act to protect Indian families from disruption).

In each of these state and federal cases, the court specifically considered whether the reasons underlying the laws or policies at issue were rationally tied to the fulfillment of Congress' unique obligations toward Native Americans. This application by the Fifth, Eighth and Ninth Circuits and the Supreme Courts of Vermont and Maine of a standard of review under which constitutionality turned on the relationship between the law and uniquely Native American concerns sharply differentiates these cases from the present case and the D.C. Circuit's decision in *Narragansett* where this essential factor was eliminated from the analysis.

Respondents' attempt to characterize these two conflicting approaches as merely a matter of semantics is unavailing. That the *Mancari* test does not carry a name tag identifying it as a "fourth level" of scrutiny is irrelevant to the question presented for review. *See* Opp. at 10-11. Nor is it significant that courts that have applied traditional rational basis scrutiny have cited *Mancari* or even that they have referred to that standard as a rational basis test. Indeed, it is exactly because this confusion exists in the lower courts that Petitioners seek this Court's review. Moreover, Petitioners readily agree that the *Mancari* test is similar to traditional rational basis scrutiny in that the required nexus between the law and its purpose must be "rational" as opposed to "narrow." The essential point, however, is that under the *Mancari* test – unlike under the traditional rational basis test that applies to other classifications – there can be only one legitimate purpose for a law that treats Native Americans

differently than non-Native Americans: the fulfillment of Congress' unique obligations toward Native Americans.[2]

The import of this distinction is further underscored by the conclusion of the court below, which gave a stamp of constitutional approval to a preference based on an interest that had nothing whatsoever to do with the preservation of Native American interests or the furtherance of Congress' unique obligations toward Native Americans. Had the New York court correctly applied *Mancari*, it would have struck down the State's policy of forbearance in enforcing the statutorily-mandated taxes, because the State's generalized interest in preventing violence on its streets off of the reservation cannot be tied rationally to the fulfillment of Congress' unique obligations toward Native Americans.

2. Respondents' attempt to align the conflicting cases cited by Petitioners by shifting the focus to whether the special treatment at issue was upheld in each case also is without merit. Opp. at 7-10. This argument sidesteps the question that Petitioners have presented to this Court for review – what the appropriate *standard of review* is for a law that premises such treatment on a Native American

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[2] If a law treating Native Americans differently is not rationally tied to Congress' obligations to Native Americans, then the basis for claiming that the differential treatment does not amount to a racial classification, *see Mancari*, 417 U.S. at 550, is nonexistent. Without this unique rationale, there is nothing to distinguish a preference for Native Americans from any other race-based preference. As indicated in the Petition, the potential for confusion over the proper application of the *Mancari* test is further exacerbated in the wake of the Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), which flatly held that *all* racial preferences must be strictly scrutinized. Pet. at 20. Respondents' curious attempt to demonstrate that the decisions below do not conflict with *Adarand* not only misses Petitioners' point, but it underscores the potential for confusion resulting from the coexistence of these standards. Opp. at 6-7.

classification.[3] The import of this question is highlighted by the decisions below, where the application of a lower level of judicial scrutiny resulted in the approval of a policy that would not have survived scrutiny under the specific test enunciated in *Mancari*.

Moreover, Respondents' argument that the cases can be aligned based on whether the special treatment at issue in each case was upheld is untrue. In *Williams*, the Ninth Circuit expressly rejected the construction of the Reindeer Industry Act that the agency charged with implementing the Act proposed, because the agency's interpretation would have granted a preference to native Alaskans that was unrelated to "native land, tribal status, self- government or culture" and thus was unconstitutional under *Mancari*. *See* 115 F.3d at 663-65. Concluding that this construction therefore was not entitled to the deference that typically would be afforded to an administrative agency's interpretation, the Ninth Circuit determined that the Act did not preclude non-natives in Alaska from owning and importing reindeer. *Id.* at 666.

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[3] Respondents cite Supreme Court Rule 10(b) and (c) and the Court's decision in *Yee v. City of Escondido, California*, 503 U.S. 519, 537-38 (1992), as support for their proposition that conflicting "results" of a case – presumably meaning its outcome – are what count for review on certiorari. To the contrary, this Court routinely grants certiorari to review conflicts in the application of legal standards. *See, e.g., TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 443 (1976) ("We granted certiorari because the standard applied by the Court of Appeals [for granting summary judgment] appeared to conflict with the standard applied by other Courts of Appeals."); *see also* Rule 10(b) and (c) (indicating that considerations include a decision by a state court of law resort on "an important federal question"). Moreover, nothing in *Yee* indicates that applications of different standards of review do not constitute a conflict; in fact, the observation that Respondents cite is simply that the lower courts had not reached conflicting results on the particular question that the petitioners' raised but on a different question.

3. Respondents' contention that the New York courts' decisions are consistent with the Court's precedent simply because this Court has never *required* that States collect taxes on reservation sales of fuel and cigarettes to non-Native Americans completely misses the mark. Opp. Br. at 12-13 (citing *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 425 U.S. 61, 78 (1994) (upholding the New York tax statutes and regulations at issue in this case); *Oklahoma Tax Commission v. Citizen Band of Potawatami Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) (recognizing States' authority to collect taxes on reservation sales to non-Indians); and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-62 (1980) (same)). Indeed, the mere fact that "*Attea, Potawatomi* and *Colville* [] do not mandate that States collect taxes on reservation sales of cigarettes and gasoline to non-Indians in order to comply with the dictates of the Equal Protection Clause," Opp. at 13, only begs the question. Respondents themselves highlight this flaw in their own analysis: "*Attea* was not an equal protection case and accordingly did not address any equal protection ramifications of respondents' subsequent determination not to enforce the regulations." Opp. at 12.

This case presents the ideal vehicle for addressing those equal protection ramifications and for resolving the conflict over the appropriate standard of review for a law or policy that treats Native Americans differently than non-Native Americans. This Court already has found that the application of the New York tax regulations at issue here to Native Americans is constitutionally permissible. *Milhelm Attea,* 425 U.S. at 75-78. After years of litigation by the State to establish that very point, there can be no credible argument that tribal sovereignty concerns compel a different conclusion. Accordingly, this case presents a clear set of facts to resolve the square conflict over whether a State's assertion of an interest other than one that furthers Congress'

obligation toward Native Americans to justify a law or policy that singles out Native Americans for special treatment violates the Equal Protection Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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